

No. 91-72-CFX  
Status: GRANTED

Title: Federal Trade Commission, Petitioner  
v.  
Ticor Title Insurance Company, et al.

Docketed:  
July 10, 1991

Court: United States Court of Appeals  
for the Third Circuit

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NOTE: Respond shld be as above 060291 ext til  
071091 by Souter, J. - CITED

Entry	Date	Note	Proceedings and Orders
1	May 30 1991	G	Application (A90-903) to extend the time to file a petition for a writ of certiorari from June 10, 1991 to July 10, 1991, submitted to Justice Souter.
2	Jun 2 1991		Application (A90-903) granted by Justice Souter extending the time to file until July 10, 1991.
3	Jul 10 1991	G	Petition for writ of certiorari filed.
5	Aug 9 1991		Order extending time to file response to petition until August 30, 1991.
6	Aug 23 1991		Brief amici curiae of Wisconsin, et al. filed.
7	Aug 29 1991		Brief of respondent Ticor Title Insurance Company, et al. in opposition filed.
8	Sep 4 1991		DISTRIBUTED. September 30, 1991
9	Sep 9 1991	X	Reply brief of petitioner Federal Trade Commission filed.
10	Oct 7 1991		Petition GRANTED. *****
12	Nov 19 1991		Record filed.
		*	Certified record; briefs, appendix and partial proceedings U.S. Court of Appeals, Third Circuit (1 Box) SET FOR ARGUMENT MONDAY JANUARY 13, 1992. (3RD CASE)
11	Nov 20 1991		
13	Nov 21 1991		Joint appendix filed.
14	Nov 21 1991		Brief of petitioner Federal Trade Commission filed.
15	Nov 21 1991		Brief amici curiae of Wisconsin, et al. filed.
16	Nov 27 1991		CIRCULATED.
17	Dec 19 1991		Record filed.
		*	Agency record Federal Trade Commission (26 Boxes)
18	Dec 23 1991	X	Brief amicus curiae of National Council on Compensation Insurance filed.
19	Dec 23 1991	X	Brief amici curiae of American Insurance Association, et al. filed.
20	Dec 23 1991	X	Brief amicus curiae of Hartford Fire Insurance Co., et al. filed.
21	Dec 23 1991	X	Brief amicus curiae of Pennsylvania Electric Association filed.
22	Dec 23 1991	X	Brief amici curiae of California, Colorado, Nebraska and South Dakota filed.
23	Dec 23 1991	X	Brief amicus curiae of American Land Title Association filed.

2 P/2



No. 91-72-CFX

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24	Dec 23 1991	X	Brief of respondents Ticor Title Ins. Co. et al. filed.
25	Jan 6 1992	X	Reply brief of petitioner Federal Trade Commission filed.
26	Jan 13 1992		ARGUED.

91-72

Supreme Court, U.S.

FILED

JUL 10 1991

No.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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### QUESTIONS PRESENTED

1. Whether private horizontal price-fixing is "actively supervised" by the State (for purposes of implied exemption from the federal antitrust laws) where prices are filed with a state agency but state officials do not determine whether the prices meet the State's regulatory criteria.
2. Whether the court of appeals properly deferred to the Federal Trade Commission's findings of fact.



## II

### PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guarantee Company were respondents before the Federal Trade Commission and petitioners in the court of appeals. First American Title Insurance Company was a respondent before the Commission; it settled the charges against it by consent agreement.

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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The Solicitor General, on behalf of the Federal Trade Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 922 F.2d 1122. The opinion and final order of the Federal Trade Commission (App., *infra*, 41a-136a), and the initial decision of the administrative law judge (App., *infra*, 137a-250a) are not yet officially reported.

**JURISDICTION**

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on



March 12, 1991. App., *infra*, 39a-40a. On June 2, 1991, Justice Souter extended the time for filing a petition for certiorari to and including July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), provides:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 5(c) of the FTC Act, 15 U.S.C. 45(c), provides, in pertinent part:

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. \* \* \* The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

#### STATEMENT

This case concerns horizontal price-fixing by five large title insurance companies. The ultimate issue in this case is the meaning of the requirement of "active state supervision" in the context of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

Respondents insure buyers of real property against losses due to certain defects in title. Respondents charge their customers a relatively small fee for assuming the risk of such losses, and a relatively large fee for conducting a title search and examination. A title search is a compilation, in chronological order, of publicly recorded instruments in the chain of title. A title examination is an evaluation of the legal significance of those instruments. App., *infra*, 147a-180a.

Beginning in the 1960s, respondents organized "rating bureaus" in a number of States to fix prices for title search and examination services. App., *infra*, 4a, 217a. The rating bureaus agreed on uniform rate schedules that were filed with state insurance departments. Under the States' insurance laws, respondents' rates were effective unless disapproved by state insurance officials. Although respondents' rates were not disapproved, there was no hearing, written decision, or other evidence that state officials had determined that the rates were consistent with the States' regulatory policies. The question in this case is whether respondents' price-fixing nevertheless met the legal criterion of being "actively supervised" by the States, and therefore is exempt from the federal antitrust laws, under the state action doctrine of *Parker v. Brown*, *supra*, and subsequent decisions of this Court.

1. In January 1985, the Federal Trade Commission issued an administrative complaint alleging that respondents had violated Section 5 of the FTC Act, 15 U.S.C. 45, by collectively setting rates for title search and examination services. The complaint listed 13 States as "[e]xamples of states in which one or more of the Respondents have fixed prices." App., *infra*, 45a (quoting Compl. para. 11). In their answer, respondents argued, among other things, that their price-fixing took place pursuant to clearly articulated state policies, and was

actively supervised by the States at issue. Consequently, respondents argued, their price-fixing was exempt from the antitrust laws under the state action doctrine.

In December 1986, the administrative law judge issued a decision concluding that respondents' activities, which plainly violated the FTC Act unless they were exempt from the federal antitrust laws, were exempt from those laws under the state action doctrine in some States, but not in others. App., *infra*, 137a-250a.

2. In September 1989, the Commission issued a final order and opinion prohibiting the companies from collectively setting prices for title search and examination services except "where such collective activity is engaged in pursuant to a clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." App., *infra*, 42a. The Commission observed that the state action exemption applies only where state officials "have and exercise the power to review particular anticompetitive acts." *Id.* at 53a (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)). Thus, the Commission concluded that "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." App., *infra*, 55a (quoting *New England Motor Rate Carriers*, No. 91-70 (F.T.C. Aug. 18, 1989) slip op. 15. Moreover, the Commission concluded, it is not sufficient that "the state statute \* \* \* provides some mechanism for oversight." App., *infra*, 53a. Because "[t]he mere presence of some state involvement or monitoring does not suffice," 486 U.S. at 101, "isolated instances of review" by state officials will not shield unreviewed private activity from the antitrust laws. App., *infra*, 54a. Accordingly, the Commission "h[e]ld that the active supervision requirement is satisfied only where the

state agency has acted affirmatively to review and approve the proposed tariff or rate." *Id.* at 55a.<sup>1</sup>

a. As to Wisconsin, the Commission adopted the ALJ's findings that "no hearing has ever been held \* \* \* on *any* insurance rate filing" and that the State "followed a hands-off policy in dealing with title insurers." App., *infra*, 60a. The Commission noted that respondents' 1971 rate filing remained in effect for years, even though the supporting data needed to determine whether the rates met the State's regulatory criteria were not even filed with the State until 1978. *Id.* at 60a-61a. The Commission agreed with the ALJ's finding that respondents' 1981 filing, which raised rates by 11%, was "allowed to go into effect (i.e., not disapproved)" after state officials checked only the mathematical accuracy of the filing. *Id.* at 199a. Moreover, the 1982 filing was given "a cursory reading to the point that the supporting materials (statistical data and a pro forma analysis) were not even checked for accuracy." *Ibid.* In addition, "nearly two dozen endorsements and amendments went into effect without being examined by all." *Id.* at 63a.

b. As to Montana, the Commission found that "the record demonstrates that rates from the 1983 filing went

<sup>1</sup> As discussed below, the Commission ultimately held that respondents' activities were not actively supervised in four States—Arizona, Connecticut, Montana, and Wisconsin. This petition focuses on respondents' activities in Wisconsin and Montana. These two examples are sufficient to frame the central legal issue presented by this case. In addition, the court's application of its "basic level of activity" test to those two States is particularly troubling, because the court did not suggest that officials in those states determined that respondents' price-fixing was consistent with state policy. We also submit however, for the reasons set out below, see pages 19-20, *infra*, that the court of appeals' decision—in particular, its holdings as to Connecticut and Arizona—does not accord sufficient deference to the Commission's findings of fact.



into effect without being examined." App., *infra*, 76a. The Commission observed that a rating bureau representative met with state insurance officials and was told that, although the increase would go into effect immediately, additional supporting data would have to be filed with the insurance department. *Id.* at 74a. Respondents never provided the required supporting data. *Ibid.* The Commission rejected the argument that the active supervision requirement was satisfied by hearings, "held three years before the formation of the rating bureau," concerning "restrictive legislation designed to keep \* \* \* attorneys, real estate brokers, and lending institutions \* \* \* out of the title insurance business." *Id.* at 75a. The Commission agreed with complaint counsel that "such hearings cannot substitute for supervision of the price-fixing in question." *Id.* at 75a-76a. Similarly, the Commission concluded that the Montana legislature's enactment of legislation *after* respondents' price-fixing does not constitute active supervision. "Otherwise," the Commission observed, "states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute." *Id.* at 76a.<sup>2</sup>

3. The court of appeals reversed. App., *infra*, 1a-38a. The court noted that respondents "do[] not dispute the FTC's holding that the horizontal price-fixing agreements among five of the nation's largest title insurance companies \* \* \* were anticompetitive and unfair within the meaning of § 5 of the FTC Act." *Id.* at 2a. But the court

<sup>2</sup> The Commission also rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from Commission review under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), App., *infra*, 78a-99a, and that respondents' price-fixing was protected under the *Noerr-Pennington* doctrine, *id.* at 99a-105a.

held that respondents' price-fixing activities were exempt from the antitrust laws under the state action doctrine.<sup>3</sup>

The court of appeals recognized that "[i]n the aftermath of *Patrick*, it is clear that the active supervision test requires that the state 'have and exercise' the power to review the particular anticompetitive acts." App., *infra*, 27a. The court noted that this Court has considered four factors in determining whether the active supervision requirement is met: "(1) whether the state establishes the rates; (2) whether the state reviews the reasonableness of the rates; (3) whether the state monitors market conditions; and (4) whether the state ha[s] engaged in any 'pointed reexamination' of its program." *Ibid.* (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)). The court of appeals quoted language from the First Circuit's decision in *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1990) (*NEMRB*), as "most instructive on what type of showing is necessary to satisfy *Midcal's* active supervision prong." App., *infra*, 27a. The court declared (*id.* at 28a (quoting *NEMRB*, 908 F.2d at 1071)):

Where \* \* \* the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry

<sup>3</sup> The court did not reach respondents' additional arguments that their price-fixing was protected under the McCarran-Ferguson Act and the *Noerr-Pennington* doctrine. App., *infra*, 38a n.17. In addition, the court refused to consider respondents' separation of powers argument. *Ibid.*



out the state's policy and not simply their own policy, more need not be established.

The court of appeals agreed with the Commission that there was no evidence in the record that any of the States at issue monitored market conditions or engaged in a pointed reexamination of their program. But the court concluded that the States at issue nevertheless satisfied the test quoted above. Although the court of appeals did not elaborate on the amount or type of official activity necessary to satisfy its "basic level of activity" test, the court concluded that Wisconsin and Montana had satisfied the test even though it did not find that state officials had determined that the particular rates prescribed by the rate agreements at issue were consistent with the State's policies.

The court held that Wisconsin actively supervised respondents' price-fixing. The court concluded that state officials had the power to regulate respondents' rates, because state law "required Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory," and "to reject rates following a hearing if they do not meet the statutory criteria." App., *infra*, 36a (citing Wis. Stat. Ann. §§ 625.11(1), 625.22 (West 1980)). The court of appeals also concluded that Wisconsin had exercised the power to supervise respondents' price-fixing. The court observed that "Wisconsin's program of supervision was in place during the relevant time and \* \* \* was staffed and funded." App., *infra*, 36a. Moreover, the court said, Wisconsin officials had "ample power and the duty to regulate pursuant to declared standards of state policy," and the duty was enforceable through mandamus proceedings in the state courts. *Ibid.* Finally, the court con-

cluded, Wisconsin officials "demonstrated some basic level of activity directed towards seeing that [respondents] carried out the state's policy." *Id.* at 36a-37a. The court noted that "Wisconsin's Insurance Department raised questions regarding the 1971 filing and later ruled it was acceptable. The Insurance Department checked the 1981 filing for accuracy. The 1982 filing also received some review from the Insurance Department." *Id.* at 37a.

As to Montana, the court of appeals concluded that state officials were required to make sure that all rate bureau filings complied with state statutory requirements, and to reject any rates that did not meet the statutory criteria. App., *infra*, 34a (citing Mont. Code Ann. §§ 33-1-311, 33-16-201, 33-16-204 to 33-16-206, 33-16-211 (1989)). The court said that Montana's program of supervision was in place, staffed, and funded, and that an action for a writ of mandamus was available in the Montana courts to compel the insurance officials to determine whether a particular rate met the State's statutory criteria. App., *infra*, 35a. Finally, the court concluded that state officials in Montana had engaged in "some basic level of activity" directed towards assuring compliance with the State's regulatory policies. *Ibid.* The court observed that "someone from Tigor's rating bureau met with officials of Montana's Insurance Department. The state officials told Tigor's representative that the increase would go into effect immediately and approved the filing. However, the state officials requested additional supporting data." *Ibid.* (citations omitted). The court noted, however, that "[t]here was no evidence that [respondents] ever supplied this supporting data." *Id.* at 35a n.16. The court of appeals nevertheless concluded that "the quantity of Montana's actions [was] sufficient to allow [respondents] to invoke the state action doctrine." *Id.* at 35a.

The Commission's petition for rehearing was denied, over three dissents. App., *infra*, 39a-40a.

#### REASONS FOR GRANTING THE PETITION

In this case a major multi-state investigation and enforcement proceeding by the Federal Trade Commission has been effectively nullified by a federal court of appeals through adoption of a recently minted legal standard that critically weakens the test this Court has devised to bring private anticompetitive conduct within the implied exemption from the antitrust laws established by *Parker v. Brown*, 317 U.S. 341 (1943). The court of appeals' decision represents a dramatic expansion of judicially created immunity from the federal antitrust laws. The holding, in practical effect, permits private parties to engage in horizontal price-fixing free from either federal antitrust scrutiny or state supervision.

The court's decision significantly redefines and vitiates the carefully constructed "active supervision" requirement laid down by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), and applied in subsequent cases. The court of appeals' watered-down version of "active supervision"—which requires only that a state agency with authority to regulate be staffed, funded, and engaged in "some basic level of activity"—cannot be reconciled with this Court's firm insistence that the state action doctrine exempts only those "particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Where, as here, the State has not determined whether particular prices fixed by competitors are consistent with State policy, "there is a real danger" that private parties are acting only "to further [their] own interests

rather than the governmental interests of the State" reflected in a state regulatory program that suffices to protect the public interest in lieu of the antitrust laws. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

In addition to creating a category of private anticompetitive activity that is neither supervised by state officials nor subject to the federal antitrust laws, the court of appeals' vague and lax formulation of the "active supervision" requirement will generate uncertainty among businesses, consumers, and regulators. In place of the relatively clear requirement that private conduct is subject to the federal antitrust laws unless state officials actually determine that the conduct comports with the State's regulatory policies, the court of appeals has substituted a standardless "basic level of activity" test. Moreover, the court of appeals' test invites an intrusive inquiry into state administrative processes that is inconsistent with the principles of federalism that underlie the state action doctrine.

The court of appeals' decision—most particularly the legal standard it adopted and applied—will have a substantial adverse effect on the Commission's enforcement program. Because the FTC Act permits any entity carrying on business in the Third Circuit to seek review of a Commission cease-and-desist order in that circuit, see 15 U.S.C. 45(c), the Commission is unlikely to have the opportunity to challenge the "basic level of activity" test in other circuits in future nationwide enforcement proceedings. Indeed, in this very case the States under discussion—Wisconsin, Montana, Arizona, and Connecticut—are all located outside the Third Circuit. The Third Circuit's decision will also affect antitrust enforcement by the Antitrust Division of the Department of Justice, as well as private antitrust actions. This Court should grant certiorari to make clear that the "active supervision" prong of the state action exemption requires a showing that the



State "has acted affirmatively to review and approve" challenged private conduct. App., *infra*, 55a.

1. In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that the Sherman Act did not invalidate a California statute that authorized a state commission to impose price-enhancing restrictions on private raisin producers. Essential to the Court's decision in *Parker* was the fact that "it is the state, acting through the [state] Commission, which adopts the program." *Id.* at 352. The Court observed that "a state does not give immunity to [private parties] who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citing *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 334-347 (1904)).

In *Midcal*, the Court expressly held that the state action exemption of *Parker v. Brown* does not apply unless the challenged restraint is not only "clearly articulated and affirmatively expressed as state policy," but also "'actively supervised' by the State itself." 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). In *Midcal*, the Court concluded that, where the State does not establish prices, review the reasonableness of prices, monitor market conditions, or engage in any "pointed re-examination" of the program, a "gauzy cloak of state involvement" is not sufficient to confer antitrust immunity on private anticompetitive conduct.<sup>4</sup> 445 U.S. at 106.

<sup>4</sup> In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), which concerned collective ratemaking by motor carriers, the Court noted that, under the regulatory scheme there at issue, "[a] proposed rate becomes effective if the state agency takes no action within a specified period of time," and that the state agencies "have and exercise ultimate authority and control over all intrastate rates." *Id.* at 50-51. In that case, unlike this one, the government conceded that the state agencies actively supervised the private

The "active supervision" requirement is fundamental to proper confinement of the scope of the implied exemption recognized in *Parker v. Brown*. That exemption is based on reluctance to assume that the federal statutes broadly prohibiting anticompetitive commercial practices, even though comprehensively drafted, were meant to prohibit acts of the States themselves. Cf. *Gregory v. Ashcroft*, No. 90-50 (June 20, 1991). But that judicially implied exemption cannot properly be extended to allow the States merely to immunize private conduct from prohibitions enacted by Congress. It is not the province of the States to repeal the federal antitrust laws, industry by industry, and substitute authorization of privately imposed trade restraints.

This Court, therefore, has consistently adhered to the rigorous "active supervision" requirement in decisions applying the state action exemption. In *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), the Court held that state monitoring that fails to exert "significant control" over anticompetitive conduct does not constitute active supervision. *Id.* at 345 n.7. Most recently, in *Patrick v. Burget*, 486 U.S. 94 (1988), the Court explained that the active supervision requirement can be met "only if the State effectively has made [the challenged private] conduct its own." *Id.* at 106. The Court added that the active supervision requirement

is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of

activity. *Id.* at 62. Accordingly, only application of the "clear articulation" prong of the *Midcal* test was at issue in this Court. *Ibid.* Indeed, the state agencies involved in the motor carriers case did in fact "consistently require hearings." *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476 (N.D. Ga. 1979).



private parties that, in the judgment of the State, actually further state regulatory policies. \* \* \* The mere presence of some state involvement or monitoring does not suffice. \* \* \* The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

*Id.* at 100-101. Accordingly, forms of "state involvement or monitoring" that do not "exert[] any significant control over" the terms of the restraint" are not sufficient to warrant displacement of national economic policy. *Patrick*, 486 U.S. at 101 (quoting *324 Liquor*, 479 U.S. at 345 n.7). See generally Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 695-696 (1991).

2. The court of appeals' decision in this case reduces the "active supervision" requirement to an empty formality. The court's novel standard is not only toothless; it cannot be reconciled with this Court's holdings that private anticompetitive activity does not qualify for the state action exemption unless state officials have made a judgment that the particular private conduct at issue furthers, or at least is consistent with, the State's policies. See *California Retail Liquor Dealers v. Midcal*, *supra*; *Patrick v. Burget*, *supra*; *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (state agency's passive acceptance of tariff does not confer state action immunity). In this case, state officials engaged in "some basic level of activity"—by accepting submissions for filing, sometimes checking them for accuracy, and occasionally requesting additional data—without determining whether the particular private price-fixing met the State's regulatory criteria. The court of appeals' unfocused inquiry into the activity level of state officials does not suffice as a basis for conferring an implied exemption from antitrust prohibitions. As leading

commentators have noted, the essential inquiry is "whether the *operative decisions* about the challenged conduct [were] made by public authorities or by private parties themselves." 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213b, at 73 (1978) (emphasis added).

In this case, it is clear that respondents—not state officials—made the operative decisions. Respondents fixed prices through their private rating bureaus. Respondents then filed their rates with state insurance departments. The Commission found (and the court of appeals did not purport to reject its findings) that no state official determined that respondents' rates were consistent with the State's regulatory criteria. See App., *infra*, 61a, 74a. Thus, respondents' rates remained in effect only because state officials took no steps to disapprove them.<sup>5</sup>

In Wisconsin, for example, the court of appeals relied on the Commission's findings that state officials "checked the 1981 filing for accuracy" and that the 1982 filing "also received some review." App., *infra*, 37a. That is not a sufficient factual basis for the court of appeals' conclusion that "Wisconsin satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors." *Ibid.* As to the first factor, the court of appeals' conclusion that the State "established the rates" is simply untrue. Respondents, not the State, established the collective rates through their rating bureau.

<sup>5</sup> Although the Third Circuit purported to follow the First Circuit's decision in *New England Motor Rate Bureau, Inc. v. FTC (NEMRB)*, *supra*, in fact the Third Circuit's decision goes considerably further than the First Circuit's decision in *NEMRB*. In *NEMRB*, the First Circuit concluded, on the basis of the parties' stipulations, that "the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute" and that "unreasonable rates [are] rejected" by state regulators. 908 F.2d at 1077. Here, in contrast, there were no such stipulations or findings.

Although the State *could* have established the rates itself (by holding a hearing and issuing an order) it did not do so. Nor did the State review the reasonableness of the rates established by respondents. Reviewing a filing for accuracy is not the same as reviewing the reasonableness of the rates; a filing may be both accurate and unreasonable.

In Montana, state officials told respondents' representative that the collective rates would go into effect immediately, but that respondents would be required to submit additional supporting data. Respondents never supplied that information. It is formalism in the extreme to suggest, based on this record, that Montana somehow established the rates and reviewed the reasonableness of the rates. Indeed, the officials' unfulfilled request for additional data is itself a smoking gun; it powerfully indicates that state officials never determined that the rates were consistent with state policies.

In sum, Wisconsin and Montana made *no* judgment that respondents' price-fixing furthered state policy. As Professors Areeda and Turner explain, where "[t]ariff provisions \* \* \* take effect unless the [state] agency takes affirmative steps to suspend or disapprove them, \* \* \* [a]gency inaction is not sufficient to justify immunity." 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213f, at 77-78 (1978).

3. a The court of appeals concluded that officials in both Wisconsin and Montana are required by state law "to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory" and to "reject any rates if they did not meet the statutory criteria." App., *infra*, 34a, 36a. Even if the court of appeals were correct on this point, we think respondents' price-fixing would violate the federal antitrust laws, because the States did not in fact determine that respondents' price-fixing met the States'

regulatory criteria. But, in any event, the court of appeals was incorrect in suggesting that state law imposes on officials in Wisconsin and Montana a mandatory duty to review every filed rate and to reject all rates that do not meet the State's criteria. On the contrary, insurance officials in both States have discretion to review, or not review, particular rate filings.<sup>6</sup> Where state officials have such discretion, their failure to act to disapprove a particular filed rate does not warrant a presumption that state officials have made an affirmative determination that the rate is in accord with state policy. On the contrary, inaction by state officials in the context of such a regulatory regime generally indicates nothing more than that the State has elected to allocate its resources to other matters. That falls far short of an actual determination that the rates are consistent with the state's regulatory criteria. See 1 P. Areeda & D. Turner, *supra*, ¶ 213f, at 78.<sup>7</sup>

<sup>6</sup> The provisions of state law cited by the court of appeals do not support its statements that state officials are required to determine whether every filed rate is consistent with the State's criteria. See Wis. Stat. Ann. § 625.11(1) (West 1980) ("Rates shall not be excessive, inadequate or unfairly discriminatory."); *id.* § 625.13 (insurers shall file all rates "within 30 days after they become effective"); *id.* § 625.22 ("If the commissioner finds after a hearing that a rate is not in compliance with § 625.11, the commissioner shall order that its use be discontinued"); Mont. Code Ann. § 33-1-311 (1989) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); *id.* § 33-16-201 ("Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.").

<sup>7</sup> In a "somewhat similar," although "by no means identical," context, *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 n.14 (1988), the Court has rejected the argument that "inaction" or "mere acquiescence" by the State converts private action into state action. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354-355 (1974) (termination rules included in utility company's tariff,



b. In *Patrick*, this Court reserved the question “whether judicial review of private conduct ever can constitute active supervision.” 486 U.S. at 104. The court of appeals’ decision in this case rests in part on its conclusion that, in each State at issue, private parties have a right to seek a writ of mandamus from a state court to compel state officials to determine whether a particular filed rate meets the State’s regulatory standards. The court of appeals’ erred in relying on this hypothesized remedy. In this case, as in *Patrick*, the judicial review available to consumers, if it “exists at all, falls far short of satisfying the active supervision requirements.” *Ibid.* As noted above, state officials in each State at issue have discretion to decide whether to review particular rate filings to determine whether they meet the state’s regulatory criteria. Mandamus is an extraordinary remedy, issued only in the discretion of the court and is, in any event, not available to compel state officials to exercise their discretion in a particular way. See, e.g., *Jeppeson v. State Dep’t of State Lands*, 205 Mont. 282, 667 P.2d 428 (1983); *Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714, 716 (1988) (mandamus not appropriate “when the officer’s duty is not clear and requires the exercise of judgment and discretion”). Accordingly, it cannot here afford the type of judicial review that arguably might satisfy the “active supervision” requirement.

More generally, we think the “active supervision” requirement is not satisfied by the mere availability of a possible judicial remedy. Judicial review is a costly and time-consuming process. At best, a requirement that consumers resort to an action in state court will impose significant delays during which private parties may engage in anticompetitive behavior that ultimately is determined not to be consistent with the State’s policies. At worst,

but not considered in hearings on rate increases, are not state action for purposes of 42 U.S.C. 1983. See also *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978).

consumers will not avail themselves of judicial review even where it is available. That is particularly true where, as here, the benefits of a successful lawsuit will be shared by many consumers, but the costs are likely to be borne by the few consumers who seek judicial review. In short, a State does not “actively supervise” private anticompetitive activity by shifting to consumers the burden of monitoring the marketplace and bringing an action in state court to enforce compliance with state standards. See generally Elhauge, *supra*, 104 Harv. L. Rev. at 712-717.

4. In describing the court of appeals’ departure from this Court’s standard for active state supervision—under which the antitrust exemption for state action applies “only if the State effectively had made [the anticompetitive private] conduct its own,” *Patrick v. Burget*, 486 U.S. at 106—this petition has focused on respondents’ activities in Wisconsin and Montana. In addition, however, the court of appeals reversed the Commission’s determinations that respondents’ price-fixing in Arizona and Connecticut was not actively supervised by state officials. In so doing, the court disregarded the established rule that the Commission’s findings are conclusive if supported by substantial evidence, see 15 U.S.C. 45(c); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986), and the corollary rule that, in reviewing Commission decisions, courts may not “make [their] own appraisal of the [evidence], picking and choosing for [themselves] among uncertain and conflicting inferences,” 476 U.S. at 454. In particular, the court of appeals relied on testimony by an Arizona official that “every filing submitted from 1972 to 1983 ‘was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved.’” App., *infra*, 31a. Similarly, the court of appeals relied on testimony by a Connecticut official that “the state’s Insurance Department ‘reviews every filing that we receive.’” *Id.* at 33a.

In relying on these isolated bits of testimony, the court of appeals failed to recognize that the Commission considered the entire record in this case—making credibility determinations and resolving conflicting evidence—and arrived at a different appraisal of the facts. In Arizona, for example, the Commission found that there was “no convincing evidence that [respondents’ 1968 rate filing] was \* \* \* reviewed by the state.” App., *infra*, 68a, 70a. Moreover, the Commission found that “in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are ‘deemed’ to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner.” *Id.* at 69a. As to Connecticut, the court of appeals ignored the Commission’s finding that “state officials had readily identified aspects of collective ratemaking that they themselves considered crucial but which were not being supervised at all,” *id.* at 56a, and its additional finding that numerous endorsements and amendments filed by respondents without any supporting data were not reviewed by state officials, *id.* at 58a, 60a.

Although the court’s refusal to accept the Commission’s appraisal of the evidence, standing alone, might not warrant certiorari, we think further review of that issue is warranted in the context of this case, which also presents the general question of the proper legal standard for applying the active supervision requirement to a regime of filed rates. If this Court determines, as we submit, that the court of appeals applied an incorrect legal standard, it could, of course, remand the case to the court of appeals for application of the correct standard by that court to Arizona and Connecticut.

5. This case concerns horizontal price-fixing. No antitrust offense is more “dangerous to society.” *FTC v. Superior Court Trial Lawyers Ass’n*, 110 S. Ct. 768, 781

n.16 (1990) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1509, at 412 (1986)). Indeed, the price-fixing at issue here is even more dangerous than ordinary price-fixing, because the state agency provides a mechanism for monitoring and enforcing competitors’ participation in the cartel. The court of appeals’ decision thus threatens to abrogate the protections of the federal antitrust laws—and to leave consumers substantially unprotected—in a wide variety of industries, professions, and occupations that are nominally subject to state regulation.

#### CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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JULY 1991

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 89-3787

**TICOR TITLE INSURANCE COMPANY, CHICAGO TITLE  
INSURANCE COMPANY, SAFECO TITLE INSURANCE COMPANY  
(NOW KNOWN AS SECURITY UNION TITLE INSURANCE  
COMPANY), LAWYERS TITLE INSURANCE CORPORATION AND  
STEWART TITLE GUARANTY COMPANY, PETITIONERS**

**-v.-**

**FEDERAL TRADE COMMISSION, RESPONDENT**

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**On Petition for Review of an Order of the  
Federal Trade Commission (FTC Docket No. 9190)**

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**Argued: August 28, 1990  
Filed January 9, 1991**

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**Present: HUTCHINSON and NYGAARD, *Circuit Judges*, and  
RE, *Judge* \***

**(Opinion Filed January 9, 1991)**

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**\* Hon. Edward D. Re, Chief Judge of the United States Court of  
International Trade, sitting by designation.**

**(1a)**



## OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*.

Five of the nation's largest title insurance companies, Tigor Title Insurance Company, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation and Stewart Title Guarantee Company (collectively Tigor), petition for review of a final order of the Federal Trade Commission (FTC). In a forty-seven page majority opinion that formed the basis of the FTC's final order, the FTC held that the five title insurance companies engaged in "[u]nfair methods of competition" in violation of § 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C.A. § 45(a)(1) (West Supp. 1990), when they collectively agreed to set rates for title search and examination services in six states. The final order found antitrust violations in Arizona, Connecticut, Montana, New Jersey, Pennsylvania and Wisconsin.

In its petition for review, Tigor does not dispute the FTC's holding that the horizontal price-fixing agreements among five of the nation's largest title insurance companies for title search and examination services at issue in this case were anti-competitive and unfair within the meaning of § 5 of the FTC Act. Instead, Tigor advances four alternate arguments for reversal of the FTC's final order. Tigor's first argument is that the state action doctrine, which traces its origin to the Supreme Court's opinion in *Parker v. Brown*, 317 U.S. 341 (1943), immunizes its challenged collective rate setting activities from antitrust liability. Tigor's second argument is that its challenged activities are exempt from the antitrust laws pursuant to § 3(a) of the McCarran-Ferguson Act, 15 U.S.C.A. § 1013(a) (West 1976). Tigor's third argument is

that its activities constitute joint petitioning of state regulators immune from antitrust liability under the *Noerr-Pennington* doctrine. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Tigor's final and most abbreviated argument, taking up less than two pages of the ninety pages of briefing it submitted in this cause, is that the FTC's final order is void because its proceeding violated the doctrine of separation of powers since the FTC exercises executive power and yet is not subject to the executive branch's control.<sup>1</sup>

For the reasons set for below, we hold that Tigor's collective rate setting for title search and examination services in these six states is immune from federal antitrust liability under the state action doctrine. As we examine in more detail below, the state action doctrine limits the reach of the FTC's enforcement jurisdiction. As a result, we find it unnecessary to address at any great length Tigor's other three arguments in favor of reversing the FTC's order. Thus, we will grant Tigor's petition for review and will vacate the FTC's final order.

<sup>1</sup> In 1985, Tigor filed suit against the FTC in the United States District Court for the District of Columbia challenging the prosecution of this action solely on grounds that the FTC was unconstitutionally exercising executive branch authority in violation of the principle of separation of powers. The district court dismissed the challenge as unripe since the FTC had yet to take final action. See *Tigor Title Ins. Co. v. FTC*, 625 F. Supp. 747 (D.D.C. 1986), *aff'd*, 814 F.2d 731, (D.C. Cir. 1987). While the court of appeals affirmed the district court's dismissal of the constitutional challenge, the three judges on its panel wrote separate opinions, no one of which garnered a majority, concerning whether the district court's dismissal was justified by a failure to exhaust administrative remedies, a lack of final agency action or a lack of ripeness. See *Tigor*, 814 F.2d 731.

## I.

On January 7, 1985, the FTC issued an administrative complaint alleging that six <sup>2</sup> of the nation's largest title insurance companies had engaged in "[u]nfair methods of competition" in violation of § 5 of the FTC Act, 15 U.S.C.A. § 45(a)(1) (West Supp. 1990).<sup>3</sup>

The alleged antitrust violation was the insurers' agreements collectively to set rates for title search and examination services.<sup>4</sup> At one time or another, these insurers set uniform rates for title search and examination services through private "rating bureaus" in thirteen states. The FTC did not challenge the insurers' collective formulation of uniform rates for insuring against the risk of loss from defective title. Thus, this aspect of title insurance is not before us.

The matter came before an administrative law judge (ALJ) who held hearings and took evidence. The ALJ issued an initial decision and proposed order on December

<sup>2</sup> One of the six original respondents, First American Title Insurance Company, settled the charges against it in a consent agreement with the FTC. See *In re Ticor Title Ins. Co.*, No. 9190 (July 30, 1987) (LEXIS, Trade library, FTC file). Thus, the FTC's final order affected only five title insurance companies, all of whom have joined as petitioners before this Court.

<sup>3</sup> In the weeks following the FTC's initiation of this action in 1985, thirteen class action suits were filed against the insurance companies. The suits were consolidated for pretrial purposes and were settled in a judgment entered in June of 1986. Two state court challenges to the settlement judgment are pending, one in Arizona and one in Wisconsin.

<sup>4</sup> The initial complaint also challenged the insurers' collective formulation and filing of charges for settlement and escrow services. The FTC, in its final order, dismissed these portions of the complaint since the FTC's complaint counsel failed to develop a record sufficient to sustain the charges. Thus, the final order only affects the insurers' collectively set rates for title search and examination services.

26, 1986. The ALJ found without merit the insurers' claims that the collective formulation of rates for title search and examination services is part of the "business of insurance" exempt from the FTC Act pursuant to § 3(a) of the McCarran-Ferguson Act, 15 U.S.C.A. § 1013(a) (West 1976). The ALJ also rejected the insurers' claim that the challenged conduct was protected from antitrust liability under the *Noerr-Pennington* doctrine as joint petitioning of state regulators in an attempt to influence state policy.

As to the insurers' remaining defense of state action,<sup>5</sup> the ALJ ruled that in Connecticut and Wisconsin the insurers' collective rate setting was not supervised at all and thus could not satisfy the "active supervision" requirement of the doctrine. The ALJ held that the insurers' price-fixing in Arizona, Idaho, Montana, New Jersey and Pennsylvania satisfied the two-pronged state action defense and was thus immune from antitrust liability. Finally, the ALJ ruled that with respect to Ohio, the FTC's complaint counsel, who prosecuted the case on behalf of the govern-

<sup>5</sup> The "state action" doctrine protects private price-fixing if such conduct is (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) the state itself actively supervises the conduct. See *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The original complaint challenged joint price-setting in thirteen states. The insurers raised the state action defense with respect to twelve of these thirteen states. Following the Supreme Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the FTC's complaint counsel declined to pursue charges concerning five of the thirteen states.

The issues tried before the ALJ relating to the state action defense were: (1) in New Jersey and Pennsylvania, did the state authorize joint rate-setting of title search and examination charges for attorney-agents and (2) in Arizona, Connecticut, Idaho, Montana, Ohio and Wisconsin, was there active state supervision.



ment, failed to prove that the insurers used their rating bureau to establish uniform rates for title search and examination services.

The insurers appealed the ALJ's initial decision to the FTC, and complaint counsel cross-appealed. On September 19, 1989, the FTC, through four commissioners, issued its final order and decision affirming in part and reversing in part the ALJ's decision.<sup>6</sup> It is the FTC's decision that is before us for review.

In its decision, the FTC independently considered the record, including the ALJ's initial decision and findings. With respect to the insurers' state action defense, the FTC rejected its application to New Jersey and Pennsylvania, finding that the relevant state statutes did not clearly articulate a policy to displace competition with regulation.<sup>7</sup> The FTC found that the contrary position that the state insurance departments in both states advanced was in conflict with the plain and unambiguous meaning of the relevant state statutes.

The FTC also rejected the state action defense as to Arizona, Connecticut, Montana and Wisconsin on the

<sup>6</sup> The FTC's full compliment of commissioners is five. Commissioner Machol did not participate in the decision that resulted in the final order in this matter. Furthermore, Commission Chairman Steiger did not participate in the decision leading to the final order because she took her post after the FTC reached its decision but before the decision was issued. Chairman Steiger's predecessor, Chairman Oliver, "[p]rior to leaving the Commission . . . registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter." Joint Appendix (Jt. App.) at 126 n.\*.

<sup>7</sup> Commissioner Calvani dissented as to this conclusion. In its amicus brief filed in support of the insurers, the Pennsylvania Insurance Department, which is the state executive branch agency responsible for the execution and enforcement of all Pennsylvania insurance laws, also disagrees with this conclusion so far as it construes the law of Pennsylvania.

ground that the "active supervision" requirement of the state action doctrine was not satisfied.<sup>8</sup> The FTC dismissed the complaint's allegations concerning Idaho and Ohio. It split evenly over whether there was active supervision of the insurer's collective ratemaking in Idaho. It agreed with the ALJ that the FTC's complaint counsel failed to demonstrate a sufficient link between the collective filing of risk rates and fees for the insurers' search and examination services in Ohio.

Next, the FTC held that the insurers' collective formulation of charges for search and examination services was not part of the "business of insurance" and thus was not exempt from regulation under the FTC Act by reason of the McCarran-Ferguson Act. The FTC agreed with the ALJ that searches and examinations are services that persons and entities other than insurance companies commonly perform. Further, the FTC found that insurance companies themselves usually differentiate between the rates charged for indemnification against loss from non-record title defects (which the FTC viewed as the core function of title insurance) and the rates charged for tracking down title defects prior to writing the policy.

The FTC then went on to reject the insurers' claim that their collective ratemaking for search and examination services was immunized from antitrust regulation under the *Noerr-Pennington* doctrine. The FTC wrote that the challenged conduct was the type of commercial activity that has traditionally had its validity determined by the antitrust laws and was not "political activity with a commercial impact." Joint Appendix (Jt. App.) at 170.

<sup>8</sup> Commissioner Azcuenaga partially dissented from this holding, concluding instead that Arizona and Connecticut did actively supervise the insurers' rate-setting activities.

The FTC's final order to cease and desist prohibits the insurers from fixing prices for title search and examination services in the six states where violations of law were found. However, the order contains a proviso that permits collective establishment of rates for search and examination services in any of these states if undertaken "pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." <sup>9</sup> Jt. App. at 125.

In their petition to this Court, the insurers ask us to reverse the FTC's final order. The FTC asks us to affirm the order and to issue our own order mandating its enforcement, which Congress requires us to do to the extent the FTC's order is affirmed. *See* 15 U.S.C.A. § 45(c) ("To the extent the order of the Commission is affirmed the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.").

## II.

As a result of the FTC's dismissal in its final decision of the complaint's allegations concerning Ticor's settlement and escrow services, the issues before us relate solely to Ticor's collective setting of rates for title search and examination services. A brief description of title search and examination services, and the role such services play in the issuance of a policy of title insurance, is helpful to an understanding of this case.<sup>10</sup>

Title to a piece of real estate is evidence of an ownership interest in that property. However, title is not proof of ab-

<sup>9</sup> This proviso, of course, merely restates the requirements of the state action doctrine. *See supra* note 5.

<sup>10</sup> This description is based on the excellent survey of this area that the ALJ compiled in his opinion. *See* Jt. App. at 32-60.

solute ownership. For example, a search of public records concerning a particular piece of real estate may disclose that there are liens, encumbrances, easements, covenants, restrictions or other claims in existence as to that property. Examination of the title itself would often reveal none of these preexisting defects.

As a result, potential purchasers of real estate and their lenders desire to know before purchasing or financing a purchase of property whether the title has any preexisting defects. Once such defects are discovered, the purchasers and lenders can determine whether to continue with the deal as is, whether to demand cure of certain or all of the defects or whether to call off the deal.

Title insurance did not become widely used until after the conclusion of World War II. At that time, a national market in secondary mortgages emerged. The attractiveness of title insurance was due in large part to the limitations inherent in the two methods of verifying title that existed prior to the widespread use of title insurance. These two methods that were seen as somewhat unsatisfactory were the use of title searchers and the use of attorneys' opinions.

The role of title searchers is clear from their name. They examine the public records concerning a piece of property, which includes the chain of title for that property, and report the results of that examination. A title searcher's liability for an erroneous report was limited, however, to his negligence. If the searcher made an error in searching the public records, someone harmed could recover only after proving that a reasonable title searcher would not have made such an error. Furthermore, a title searcher had no liability for title defects that were not listed in the public records. Title searchers continue to practice their trade today; however, most now work for title insurance companies.



The meaning of an attorneys' opinion is also largely self-evident. Whereas title searchers merely report on the existence of recorded documents concerning a particular title, an attorneys' opinion evaluates the legal significance of any title defects that have been discovered. However, an attorney's liability for an erroneous opinion is also limited to his professional negligence. Thus, just as with title searchers, an attorney is not liable for hidden defects in the public records that a diligent searcher could not have discovered or for public records that are themselves inaccurate.

By comparison, title insurance offers much broader protection in the event that the state of the title differs from that which a title insurance company reports it to be. The technical definition of title insurance is an agreement to indemnify the purchaser or lender "for loss or damage sustained by reason of a defect in title not explicitly excepted or excluded from the policy." *Jt. App.* at 37. In order to recover, it is unnecessary to prove negligence. Further, title insurance protects the buyer and the lender from losses resulting from defects not discoverable from a search of the public records. Such undiscoverable defects can include forgery, missing heirs, previous marital interests, impersonation and confusion of names.

As noted just above, title insurance indemnifies the purchaser or lender for loss or damage sustained by reason of a defect in title not explicitly excepted or excluded from the policy. Before issuing a title insurance policy, the insurance company conducts a search of the public records just as a title searcher or an attorney would do. In fact, title insurance companies most often employ their own searchers or attorneys to search and examine the public records. The title insurance policy usually will not insure any defects that are uncovered during this search. Instead, agents are trained specifically to exempt these record de-

fects from the scope of coverage. Thus, a title insurance policy usually insures only against undiscovered and undiscoverable title defects, regardless of negligence.

Title insurance companies choose from among three different groups of people to perform title searches. In the first group are title searchers who work for the title insurance company. We have already examined the role that such title searchers play. The second is the attorney-agent, who serves as an agent of one or several particular insurance companies. The attorney-agent searches and examines title documents. As compensation for his work, the agent receives from the title insurance company a fee that the insurance company has fixed in advance. The third is the approved attorney. An approved attorney does not have a direct employment relationship with the insurance company as does the attorney-agent. Instead, the title insurance company provides a list of approved attorneys to its customers; then, the customer and the approved attorney are free to negotiate the approved attorney's fee for the search and examination services he will perform. Often the same attorney will be an attorney-agent for one title insurance company and an approved attorney for another.

While often difficult to separate, a title search is distinct from a title examination. The search denotes the act of compiling a chronological account of the publicly recorded instruments that are found in the chain of title to a particular piece of real estate. Many jurisdictions require that the search extend back sixty years, although some jurisdictions have marketable title acts that require a shorter resort to history while other jurisdictions require tracing title as far back as its original issuance by the sovereign. The examination requires the critical evaluation of the title's condition as reflected in the documents gathered in the search.

This case involves Ticor's collective setting of rates for the search and examination services it performs. In the six states at issue, these rates are collectively set through private organizations known as title insurance rating bureaus. Title insurance companies comprise the membership of these bureaus. Once the title insurance rating bureau establishes the uniform rate for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services.

### III.

We have jurisdiction pursuant to 15 U.S.C.A. § 45(c) (West 1973) over the FTC's final order in this matter, since the FTC's cease and desist order includes within its scope methods of competition practiced within this Circuit. Ticor filed its petition for review within sixty days after the FTC served the final order,<sup>11</sup> which is within the applicable time the statute provides for filing such a petition. The FTC had jurisdiction to adjudicate this matter pursuant to 15 U.S.C.A. § 45(b) (West Supp. 1990).

We have written that "the state action exemption cases clearly indicate that this issue involves a question of law . . ." *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982); *see also New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990) ("How these facts meld into the state action concept—the issue now before us—is a legal issue which the courts have plenary authority to decide."). Thus, we exercise plenary review over the FTC's application of the state action doctrine to the facts before us.

<sup>11</sup> While the FTC issued its decision on September 19, 1989, the sixty days within which to petition for review of the decision did not begin to run until the FTC served its decision upon the insurers on October 20, 1989.

### IV.

As the Supreme Court has stated, "[t]he starting point in any analysis involving the state-action doctrine is the reasoning of *Parker v. Brown* [ , 317 U.S. 341 (1943)]." *Hoover v. Ronwin*, 466 U.S. 558, 566 (1984). In *Parker*, the Supreme Court wrote:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

*Parker*, 317 U.S. at 350-51. In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987), the Supreme Court wrote that *Parker* "rests on principles of federalism and state sovereignty."

The "state action" doctrine immunizes private price-fixing if such conduct is (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation and (2) the state itself actively supervises the conduct. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

### A.

As to New Jersey and Pennsylvania, the FTC determined that Ticor's fixing of title search and examina-



tion charges did not reflect a clearly articulated and affirmatively expressed state policy as is required under the first prong of the *Midcal* test. The FTC's complaint counsel conceded for purposes of this litigation that both New Jersey and Pennsylvania actively supervised Ticor's fixing of title search and examination services in the two states, thereby satisfying *Midcal*'s second prong. See Jt. App. at 69 n.184.

Two Supreme Court cases are central to an understanding of *Midcal*'s first prong, which requires that a state policy must be clearly articulated and affirmatively expressed in order to confer antitrust immunity. Those cases are *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), and *Southern Motor Carriers*, 471 U.S. 48.

In *Hallie*, the Supreme Court was faced with deciding whether a municipality's anticompetitive conduct met the first prong of the *Midcal* test.<sup>12</sup> In deciding whether the state clearly articulated and affirmatively expressed an anticompetitive policy, the Supreme Court adopted the views of the plurality in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.), that one need not "be able to point to a specific, detailed legislative authorization" in order to satisfy *Midcal*'s first prong. See *Hallie*, 471 U.S. at 39. Instead, the Court in *Hallie* held it was sufficient to satisfy the "clear articulation" test that Wisconsin's legislature had passed statutes giving the municipality "broad authority to regu-

<sup>12</sup> The Court held that a municipality, in order to qualify for state action immunity, need not satisfy the second prong of the *Midcal* test, which requires that the state actively supervise the anticompetitive conduct. See *Hallie*, 471 U.S. at 46-47, see also *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 235 (3d Cir. 1987) ("In *Hallie*, the Court concluded that the second element of the *Midcal* analysis did not apply when a municipality was the decisionmaker.").

late," thus making it "clear that anticompetitive effects logically would result." *Id.* at 42; see also *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (while California's Automobile Franchise Act evidenced no express intent to displace the antitrust laws, it nevertheless qualified for state action immunity because Act provided a regulatory structure that inherently "displace[d] unfettered business freedom.").

Thus, in *Hallie* the Supreme Court held that in order to satisfy the clear articulation requirement of the state action test, one merely had to show that "the legislature contemplated the kind of action complained of." *Hallie*, 471 U.S. at 44 (quotation omitted). In so doing, the Court rejected a competing argument that to satisfy the clear articulation requirement the legislature had to "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Id.* at 43. In a footnote, the Court explained why it rejected this argument:

Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable . . . because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

*Id.* at 44 n.7.

In *Southern Motor Carriers*, the Supreme Court held that a state did not have to compel private parties to perform anticompetitive conduct in order for the state action doctrine to immunize such conduct from antitrust liability. See *Southern Motor Carriers*, 471 U.S. at 60. Instead, a clearly articulated policy that permits anti-

competitive conduct is sufficient to meet the state action doctrine's clear articulation requirement. *See id.* at 61. Thus, the issue in *Southern Motor Carriers* was whether the state legislatures in Georgia, Mississippi, North Carolina and Tennessee clearly sanctioned the collective ratemaking at issue there.

The Court found that three of the states, Georgia, North Carolina and Tennessee, had statutes that expressly permitted common carriers to engage in collective ratemaking. *See id.* at 63. However, Mississippi posed a more difficult question, since its legislature "ha[d] not specifically addressed collective ratemaking." *Id.* Thus, the Court had to decide "whether, in the absence of a statute expressly permitting the challenged conduct, the first prong of the *Midcal* test can be satisfied." *Id.*

In Mississippi, the only evidence of whether the legislature had contemplated the action complained of was a law that gave the state public service commission the authority to regulate common carriers. *See id.* The law required the commission to promulgate "just and reasonable" rates. *See id.* The Court held that this law was sufficient evidence of the legislature's intent that the commission, instead of the competitive market, should determine the rates. Even though the legislature did not supply the details of "the inherently anticompetitive rate-setting process," *id.* at 64, it was sufficient that the legislature left such details up to the commission's discretion. Thus, when the commission "exercised its discretion by actively encouraging collective ratemaking among common carriers," the Supreme Court held that the carriers who took advantage of the ability to set rates collectively in Mississippi were immune from antitrust liability under the state action doctrine. *Id.* The Court concluded:

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Therefore, we hold that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi, the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

*Id.* at 64-65 (citation and footnote omitted).

# 1.

With these teachings in mind, we will first examine whether the State of New Jersey has a clearly articulated and affirmatively expressed policy that permits Ticor to charge collectively set rates for title search and examination services that its attorney-agents perform. The FTC held, over the dissent of Commissioner Calvani, that New Jersey lacked such a policy and therefore ruled that Ticor's activities in that state were not immune under the state action doctrine. The FTC's holding reversed the ALJ's holding that New Jersey did authorize the collective setting of rates for fees paid to attorney-agents for the title search and examination services they perform. *See* Jt. App. at 111.

New Jersey law pertaining to title insurance companies is found at N.J. Stat. Ann. §§ 17:46B-1 to -62 (West 1985 & Supp. 1990). It is known as the Title Insurance Act of 1974. *See* N.J. Stat. Ann. § 17:46B-2. It is clear that New



Jersey's legislature intended the Act to have broad application. Section 17:46B-3 states:

The provisions of this act shall apply to all title insurance companies, title insurance rating organizations, title insurance agents, applicants for title insurance, policyholders and to all persons and business entities engaged in the business of title insurance.

*Id.* § 17:46B-3.

The FTC based its holding that New Jersey did not have a clearly articulated policy that permitted the collective setting of fees to be paid to attorney-agents for the search and examination services they perform upon the Act's definition of "fee." *See id.* § 17:46B-1(f). While the Act permits title insurance companies to engage in the collective setting of rates, which include fees, through their privately operated rating bureaus, *see id.* §§ 17:46B-41 to -53, the FTC held that New Jersey's definition of "fee" explicitly excluded any reimbursement paid to an attorney.

The Act's definition of "fee" states:

"Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and every other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.

*Id.* § 17:46B-1(f).<sup>13</sup> Ticor argues that § 17:46B-1(f)'s

<sup>13</sup> The word "them" in the Act's definition of "fee" lacks an antecedent. However, reference to the immediately preceding definition, which explains the meaning of the term "premium," sheds light on this problem. Section 17:46B-1(e) states:

"Premium" for title insurance means that portion of the fee

definition of fee is intended merely to make clear that the state will not regulate legal fees unrelated to title insurance transactions, such as issuing opinions.

In support of its argument, Ticor points to the fact that New Jersey's Commissioner of Insurance, the state official whom the legislature has charged with regulating the title insurance industry, has approved its collective filings of rates that included the charges paid to attorney-agents for title search and examination services. *See* Jt. App. at 626-59. The Act requires the Commissioner to disapprove any filing that "does not meet the requirements of this act." N.J. Stat. Ann. § 17:46B-45(b).<sup>14</sup> Further, Ticor points to the ALJ's finding that "the history of title insurance rate regulation in New Jersey suggests that the state intended that inclusive rates should apply to attorney-agents." Jt. App. at 68.

The state action doctrine rests on principles of federalism and state sovereignty. Since the Supreme Court of New Jersey has not yet spoken on whether the Act permits New Jersey to regulate attorney-agent charges for search and examination services, we are forced to predict how that court would resolve the question. The Act, taken as a whole, clearly indicates New Jersey's intent to regulate broadly the state's title insurance industry. In the face of

charged by a title insurance company, agent of a title insurance company or approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for the assumption by the title insurance company of the risk created by the issuance of the title insurance policy.

N.J. Stat. Ann. § 17:46B-1(e).

<sup>14</sup> The Act also provides any aggrieved person with the ability to challenge any of the Commissioner's actions. *See* N.J. Stat. Ann. § 17:46B-52. The FTC has failed to bring to our attention any state challenge to the Commissioner's approval of collectively set rates that attorney-agents charge for search and examination services.

that strong intent, we believe the Supreme Court of New Jersey would hold that Ticor's suggested construction of the Act's definition of "fee" is reasonable. Under Ticor's construction, "fee" is defined to exclude charges paid to attorneys solely as a concession to the state's organized bar, in order to make clear that the Insurance Commissioner is not empowered to regulate generally the fees attorneys charge.

Under New Jersey law, where a state agency is empowered to implement a regulatory scheme pursuant to an ambiguous statutory framework, state courts will defer to the agency's reasonable construction of the statute. *See In re Township of Bridgewater*, 471 A.2d 1, 5-6 (N.J. 1984) ("We have held that an administrative agency's interpretation of a statute that it is charged with enforcing the entitled to due deference."). We believe the Insurance Commissioner's construction of the Act to permit his regulation of attorney-agents' charges for search and examination services is reasonable and thus worthy of our deference.

Furthermore, we believe it is possible to construe the Act to permit the Commissioner to regulate what attorney-agents charge for title search and examination services, even if such charges do in fact fall outside the Act's definition of "fee." In *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564 (E.D. Pa. 1974), Judge Becker, then a United States District Judge and now a member of our Court, was faced with a similar quandary. There, the court had before it the question of whether the Pennsylvania state Insurance Department in fact regulated a charge that sellers of real estate had to pay at the closing of a sale when the closing occurred in the office of a title insurance company. While the Insurance Department refused to accept filing of the so-called "seller charge" as a fee, Judge Becker wrote that "[t]he Department's view that

the charge was not a 'fee' did not preclude its regulation under a number of other provisions, and the Department never suggested that it had no power to regulate the seller charge simply because it was not a 'fee'." *Id.* at 577 n.16. Thus, the court held: "We find that the Pennsylvania regulatory statutes are comprehensive and confer virtually plenary regulatory power on the state Insurance Department, including the power to regulate the seller charge." *Id.* at 577.

Likewise, we hold that the FTC erred when it held that New Jersey lacked a clearly articulated policy to permit the collective setting of rates attorney-agents will be paid for the search and examination services they provide. Even if we were to agree that such charges are excluded from the statutory definition of the word "fee," this does not preclude New Jersey from otherwise regulating this discrete charge.

Finally, we will once again assume that New Jersey's Insurance Commissioner lacks the statutory authority to regulate search and examination charges paid to attorney-agents. As Professors Areeda and Hovenkamp, distinguished students of antitrust law, have written: "If the private defendant's challenged conduct is the result of reasonable reliance on apparently lawful government action, then [state action] immunity [under *Midcal's* clear articulation prong] should be available." P. Areeda & H. Hovenkamp, *Antitrust Law* § 212.4b, at 153 (Supp. 1989).

Even if New Jersey's Supreme Court should declare in the future that New Jersey's Insurance Commissioner's regulation of Ticor's collective setting of rates paid to attorney-agents for search and examination services was unlawful, we believe that the professors are correct that Ticor's action in reliance on the apparent lawfulness of the Commissioner's action would provide antitrust immunity up until such a declaration occurs. As the professors have



written: "The agency's action must have reasonably appeared to be lawful both in relation to the antitrust laws—for example, no wholesale delegation of unsupervised private power to act anticompetitively—and in relation to the scope of the agency's authority under state law." *Id.* at 154. We believe that Ticor meets both of these requirements in New Jersey. *See also Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) (" 'ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control" (quoting Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv. L. Rev. 435, 453 (1981))).

## 2.

The relevant facts in Pennsylvania are basically the same. The FTC held, over the dissent of Commissioner Calvani, that Pennsylvania lacked a policy that permitted the collective setting of rates that attorney-agents charge for search and examination services. The FTC therefore ruled that Ticor's activities in that state were not immune under the state action doctrine. The FTC's holding reversed the ALJ's holding that Pennsylvania did authorize the collective setting of rates for fees paid to attorney-agents for the title search and examination services they perform. *See Jt. App.* at 111.

Pennsylvania's Title Insurance Act, found at 40 Pa. Stat. Ann. §§ 910-1 to 910-54 (Purdon 1971 & Supp. 1990), also has broad application. It states:

The provisions of this article shall apply to all title insurance companies, title rating organizations, title insurance agents, applicants for title insurance, policyholders and to all persons and business entities engaged in the business of title insurance.

40 Pa. Stat. Ann. § 910-2. The Pennsylvania Insurance Department is the state's executive agency entrusted with the responsibility of executing and enforcing all of Pennsylvania's insurance laws. *See Brief of Pennsylvania Insurance Department as amicus curiae* at 4. The Act requires insurance companies or the private rating organizations to which they belong to file with the Insurance Department a manual of fees. *See* 40 Pa. Stat. Ann. § 910-37(a).

Once again, in holding that Pennsylvania had not clearly articulated a policy that permits the collective setting of rates paid to attorney-agents for search and examination services, the FTC relied on the Act's definition of "fee." The definition states:

"Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract.

*Id.* § 910-1(5).

The Pennsylvania Insurance Department has approved Ticor's collectively set rates for charges paid to attorney-agents for title search and examination services, even though the Act requires the Department to reject any filings that do not "meet the requirement of this article." *Id.* § 910-40(a). No one has ever challenged the Department's regulation of these charges, even though Pennsylvania law entitles any "person aggrieved by any action of the commissioner, except disapproval of a filing or a part thereof," to an administrative hearing. *Id.* § 910-49(a).

Ticor again argues that the definition's exclusion of charges paid to attorneys was intended as a concession to the bar that the state's Insurance Department could not regulate the traditional business of lawyering. For the same reasons as were applicable to New Jersey, the FTC's holding with respect to Pennsylvania cannot stand. Given Pennsylvania's clear intent broadly to regulate the title insurance industry, we believe the Supreme Court of Pennsylvania, which has yet to address the issue, would find Ticor's construction of the definition of "fee" to be reasonable.

Since the Act is open to more than one reasonable construction, we believe the Supreme Court of Pennsylvania would defer to the Insurance Department's construction of the Act to permit its regulation of search and examination charges paid to attorney-agents. *See Masland v. Bachman*, 374 A.2d 517, 522 (Pa. 1977) (where specialized agency is entrusted with implementing act, agency's interpretation of act is "entitled to significant weight"); *Spicer v. Pennsylvania Dep't of Pub. Welfare*, 428 A.2d 1008, 1009 (Pa. Commw. Ct. 1981) ("It is well settled that the construction of a statute by those charged with its execution and application is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous." (internal quotations omitted)).

It is true that prior to 1975 Pennsylvania's Insurance Department did not construe the Act to allow it to regulate charges paid to attorney-agents when acting as title insurance agents. However, the principles of federalism and state sovereignty that underlie the state action doctrine do not permit us to question the merits of the Insurance Department's change in construction where the so-called "new" construction appears on its face to be reasonable.

Further, as the opinion in *Schwartz* explains, *see* 374 F. Supp. at 577 & n.16, even if Pennsylvania law did not permit its Insurance Department to regulate these charges as "fees," it seems clear that the Act nevertheless gives the Insurance Department the power to regulate these charges. Finally, Ticor was and is entitled to rely upon the Insurance Department's apparently lawful regulation of these charges and the state action doctrine will immunize its reliance until it becomes clear that the Insurance Department in fact has no authority to regulate title search and examination charges paid to attorney-agents in Pennsylvania.

### 3.

Therefore, we hold that Ticor has shown that both New Jersey and Pennsylvania have clearly articulated a policy that permits the collective setting of rates for charges paid to attorney-agents for title search and examination services. Since the FTC's complaint counsel stipulated before the ALJ that both New Jersey and Pennsylvania met the second, active supervision prong of the *Midcal* state action test, we conclude that Ticor's actions in New Jersey and Pennsylvania were immune from antitrust liability under the state action doctrine. Thus, we must grant Ticor's petition for review and vacate the FTC's final order to the extent it applies to Ticor's activities in New Jersey and Pennsylvania.



## B.

The FTC held that Arizona, Connecticut, Montana and Wisconsin did not "actively supervise" Tigor's collective setting of rates and thus Tigor failed to satisfy the second prong of the *Midcal* test as to those four states. The FTC's complaint counsel stipulated before the ALJ that these four states authorized the anticompetitive activity, see Jt. App. at 65, so issues relating to *Midcal*'s second prong are all that remain before us.

The Supreme Court explained the rationale behind the active supervision requirement in *Patrick v. Burget*, 486 U.S. 94 (1988). It wrote:

The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985); see *id.*, at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46-47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct pro-

motes state policy, rather than merely the party's individual interests.

*Id.* at 100-01 (some citations omitted).

In the aftermath of *Patrick*, it is clear that the active supervision test requires that the state "have and exercise" the power to review the particular anticompetitive acts. The Supreme Court found that state action immunity was not available in *Patrick* because the state did not "have" the power to supervise the challenged activity. See *id.* at 102.

In *Midcal* and *324 Liquor Corp.*, the Supreme Court articulated four factors that are pertinent in deciding whether a state actively supervises challenged conduct. They are: (1) whether the state establishes the rates, see *324 Liquor Corp.*, 479 U.S. at 345; *Midcal*, 445 U.S. at 105; (2) whether the state reviews the reasonableness of the rates, see 479 U.S. at 345; 445 U.S. at 105; (3) whether the state monitors market conditions, see 479 U.S. at 345, 445 U.S. 106; and (4) whether the state had engaged in any "pointed reexamination" of its program, see 479 U.S. at 345; 445 U.S. at 106.

We believe the First Circuit's recent opinion in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), is most instructive on what type of showing is necessary to satisfy *Midcal*'s active supervision prong. In *New England Motor Rate Bureau*, the FTC brought an enforcement action against a private rating bureau whose members were motor carriers. The members of the rating bureau had been collectively setting rates they would charge for transportation within the State of Massachusetts and several other New England states. The only issue before the court was whether Massachusetts actively supervised the motor carriers' collective rate setting so as to satisfy *Midcal*'s second prong.

Massachusetts used a "negative option" approach to regulate rates. Under this approach, filed rates became

binding unless the state rejected or suspended the rates within a specified time. While the state had "extensive power to suspend, reject or modify rates," *id.* at 1065, Massachusetts "ha[d] not in recent history rejected any of the rates . . . nor held hearings or investigations." *Id.*

Despite these facts, the First Circuit held that Massachusetts had and exercised the power to review and disapprove of anticompetitive acts that failed to accord with state policy. The court wrote that it was clear that a Massachusetts state agency had plenary power to review and disapprove of filed rates. *See id.* at 1070. As a result, the court held that the state agency had "the authority to 'review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,' " *id.* at 1071, thus satisfying one of the two parts of the active supervision requirement.

Next, the court examined whether Massachusetts "exercised" the power that it "had." Criticizing the FTC's approach as "too demanding in the showing it would require as to the rigor and efficiency of a particular state's regulatory program," *id.*, the court wrote:

Where as here the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs.

*Id.*

Examining the four factors the Supreme Court mentioned in *Midcal* and *324 Liquor Corp.*, the First Circuit noted that the Supreme Court never had written that all four factors must be present before a court can find that active supervision exists. *Id.* at 1074. In *New England Motor Rate Bureau*, the court held that the presence of the first two of the four factors, that Massachusetts sets the rates and that the state reviews the reasonableness of the rates, was sufficient to establish the existence of active supervision. In that case, the court found the other two factors, whether the state monitors the market and whether the state has engaged in any "pointed reexamination" of its program, to be absent. Nevertheless, their absence was not fatal to the establishment of active supervision. *Id.* at 1073:

1.

With respect to Arizona, the FTC held over the dissent of Commissioner Azcuenaga that active supervision of Ticor's collective ratemaking was lacking between 1968 and 1981.<sup>15</sup> In so holding, the FTC reversed the ALJ, who had held that active supervision was present in the state. As the basis of its holding, the FTC found a lack of active supervision because Ticor's 1968 filing went into effect essentially unreviewed and because Arizona's Insurance Department failed to undertake a formal examination of the rating bureau even though an Arizona statute permitted such an examination. In Arizona, Ticor collectively set its rates through the Title Insurance Rating Bureau of Arizona, a private organization comprised of title insurance companies.

<sup>15</sup> Arizona's rating bureau went out of business for all purposes on December 16, 1981. *See* Jt. App. at 83. Arizona revoked the rating bureau's corporate charter on October 1, 1983. *See id.*



Our first inquiry is to determine whether Arizona "had" the power to regulate Ticor's collective ratemaking. It is clear the answer to this first inquiry is "yes." State law required Arizona's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. See Ariz. Rev. Stat. Ann. §§ 20-375(A) & 20-376(D). State law also required title insurers to provide with their rate filings a statement justifying the rates. See *id.* § 20-377. Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. See *id.* § 20-378(A).

Next, we must examine whether Arizona "exercised" its power to regulate Ticor's collective ratemaking. We believe the First Circuit undertook the proper inquiry in *New England Motor Rate Bureau*. Thus, we will examine whether Arizona's program of supervision was in place, was staffed and funded, had granted to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, was enforceable in the state's courts, and had demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. If so, "more need not be established." *New England Motor Rate Bureau*, 908 F.2d at 1071.

The facts before us demonstrate that Arizona's program of supervision was in place between 1968 and 1981. See Jt. App. at 81. Further, there is every indication that Arizona's Insurance Department was staffed and funded during this period. Next, as we have already seen, the Arizona legislature granted the Insurance Department ample power and the duty to enforce the law pursuant to the legislative standards. This duty was enforceable in

Arizona's state courts. See *Industrial Dev. Auth. of the County of Pinal v. Nelson*, 509 P.2d 705, 714 (Ariz. 1973) (action for a writ of mandamus is available to compel a public official to perform his duty).

Finally, the record demonstrates that the Insurance Department engaged in some basic level of activity directed at ensuring that Ticor carried out the state's policy and not simply its own. Following Ticor's rate filing in 1968, the Arizona Insurance Department sought information as to how a component of the rates was derived. The chief deputy director of Arizona's Insurance Department testified that every filing submitted from 1973 to 1982 "was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would sometimes be situations where more information was needed and once that was obtained and [the filing] met the requirements, it would be approved." Jt. App. at 1153. The ALJ found that no filing went into effect in Arizona until the director of the Insurance Department marked the filing "approved." Jt. App. at 80.

Turning next to the four factors the Supreme Court discussed in *Midcal* and *324 Liquor Corp.*, it is clear that Arizona has the final word in setting title insurance rates. These rates must be filed with the Insurance Department, and they cannot go into effect if the Insurance Department suspends or rejects them. It is also clear that Arizona has reviewed the reasonableness of the title insurance rates. The record before us does not show whether Arizona's Insurance Department in fact monitors market conditions. The record does show that Arizona has not undertaken a "pointed reexamination" of its program. As the First Circuit held in *New England Motor Rate Bureau*, we hold that the absence of the final two *Midcal* and *324 Liquor Corp.* factors is not fatal to Ticor's state action defense.

The FTC erred when it held that Tigor failed to show that Arizona actively supervised its collective filing of rates. Arizona both had and exercised the power to ensure that Tigor's rates complied with the policy that state has articulated.

The root of the FTC's error and its explanation seem to lie in its insistence on sitting "in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes." *New England Motor Rate Bureau*, 908 F.2d at 1076 (emphasis in original). As in that case, the FTC here takes the position "that the 'active supervision' prong necessitates an inquiry by the FTC into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator." *Id.* at 1075. We agree with the First Circuit's conclusion that "this goes too far." *Id.*

## 2.

With respect to Connecticut, the FTC over Commissioner Azcuenaga's dissent held that no active state supervision was present. The FTC's holding affirmed the ALJ's conclusion that active supervision was lacking in Connecticut. The FTC did not find active supervision in Connecticut because it believed that the state failed meaningfully to regulate the level of agency commissions, over which the insurance companies had no control. We disagree with the FTC's holding.

Our first inquiry is whether Connecticut officials have the authority to supervise Tigor's collective filing of rates. As with Arizona, it is clear the answer is "yes." State law required Connecticut's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See Conn Gen. Stat. Ann. § 38-201x(b)(2)* (West 1987). State law also required title insurers to provide with their rate filings a statement

justifying the rates. *See id.* § 38-201x(a)(2). Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. *See id.* § 38-201p(b).

Next, we review whether Connecticut "exercised" the authority it had to supervise Tigor's collective filing of rates. The record shows that Connecticut's program of supervision was in place during the relevant time and that it was staffed and funded. Connecticut granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. *See Beccia v. City of Waterbury*, 441 A.2d 131, 136 (Conn. 1981) (action for a writ of mandamus is available to compel a public official to perform his duty).

Further, Connecticut's Insurance Department demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. Following Tigor's 1966 rate filing, the state's Insurance Department requested justification for the premium fee. *See Jt. App.* at 71. The Insurance Department later approved the 1966 rate filing. *See id.* Tigor's second collective filing in Connecticut occurred in 1981. It is clear that the Insurance Department read the filing and approved it. Tigor's final collective filing in Connecticut took place in 1983. The Insurance Department approved the 1983 filing, even though Tigor had yet to supply supporting data. A Connecticut regulator testified that the state's Insurance Department "reviews every filing that we receive." *Jt. App.* at 1218. Just as with Arizona, Connecticut satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Tigor has established that Connecticut exercised its power to control Tigor's collective rate setting activity in that state.

The basis of the FTC's contrary holding is its finding that Connecticut failed "meaningfully" to regulate the



levels of agent commissions, which Commissioner Strenio, the author of the FTC's majority opinion, described as excessively high in his separate supplemental statement. *See* Jt. App. at 195. This description is telling. The FTC's analysis is inconsistent with the principles that inform the state action doctrine. State action immunity is available not only when a state acts wisely; instead, the wisdom of a state's policy is immaterial. As the Supreme Court has written, state action immunity is available wherever a state clearly articulates and actively supervises a policy that will displace competition.

## 3.

In Montana, the private rating bureau Tigor belonged to received its license in 1982 and ceased to exist in 1984. Its only major rate filing occurred in February, 1983. The ALJ found that active state supervision existed in Montana. The FTC disagreed, holding that the 1983 filing went into effect without any state review.

Once again, we begin by asking whether Montana's officials had the authority to supervise Tigor's collective filing of rates. As with Arizona and Connecticut, it is clear the answer is "yes." State law required Montana's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. *See* Mont. Code Ann. §§ 33-1-311 & 33-16-201. State law also required title insurers to provide with their rate filings a statement justifying the rates. *See id.* § 33-16-203. Finally, the state's Insurance Department was required to reject any rates if they did not meet the statutory criteria. *See id.* §§ 33-16-204 to 33-16-206, 33-16-211. This is sufficient to establish that Montana's Insurance Department had the power to supervise Tigor's collective filings of title search and examination charges.

Next, we review whether Montana "exercised" the authority it had to supervise Tigor's collective filing of rates. The record shows that Montana's program of supervision was in place during the relevant time and that it was staffed and funded. Montana granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. *See Jeppeson v. Montana, Dep't of State Lands*, 667 P.2d 428, 431 (Mont. 1983) (action for a writ of mandamus is available to compel a public official to perform his duty (quoting Mont. Code Ann. § 27-26-102(1))).

Further, Montana's Insurance Department demonstrated some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy. Tigor supported its 1983 filing with a five page single-spaced cover letter. *See* Jt. App. at 500-04. Following the filing, someone from Tigor's rating bureau met with officials of Montana's Insurance Department. *See id.* at 90. The state officials told Tigor's representative that the increase would go into effect immediately and approved the filing. *See id.* However, the state officials requested additional supporting data.<sup>16</sup> *See id.* Just as with Arizona and Connecticut, Montana satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Tigor has established that Montana exercised its power to control Tigor's collective rate setting activity in that state.

The FTC's conclusion was based upon its belief that Montana did not do enough to confer state action immunity upon Tigor. To the contrary, we believe that while the quality of Montana's actions may deserve the criticism that the FTC levels, the quantity of Montana's actions are sufficient to allow Tigor to invoke the state action doctrine.

<sup>16</sup> There is no evidence that Tigor ever supplied this supporting data. *See* Jt. App. at 90.



## 4.

In Wisconsin, the rate bureau Ticor belonged to submitted general rate filings in 1971, 1981 and 1982. The ALJ held that there was no active state supervision in Wisconsin. The FTC affirmed.

Again, we first examine whether state officials in Wisconsin had the power to regulate Ticor's collective filing of rates for title search and examination services. As with Arizona, Connecticut and Montana, it is clear the answer is "yes." State law required Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory. See Wisc. Stat. Ann. § 625.11(1). State law also required title insurers to provide with their rate filings a statement justifying the rates. See *id.* § 625.13. Finally, the state's Insurance Department was required to reject rates following a hearing if they do not meet the statutory criteria. See *id.* § 625.22. This is sufficient to establish that Wisconsin's Insurance Department had the power to supervise Ticor's collective filings of title search and examination charges.

Next, we review whether Wisconsin "exercised" the authority it had to supervise Ticor's collective filing of rates. The record shows that Wisconsin's program of supervision was in place during the relevant time and that it was staffed and funded. Wisconsin granted to its state officials ample power and the duty to regulate pursuant to declared standards of state policy. This duty was enforceable in the state's courts. See *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 305 N.W.2d 89, 99-100 (Wis. 1981) (" 'Mandamus is the proper remedy to compel public officers to perform duties arising out of their office and presently due to be performed.' ").

Further, Wisconsin's Insurance Department demonstrated some basic level of activity directed towards seeing

that Ticor carried out the state's policy and not simply its own policy. Wisconsin's Insurance Department raised questions regarding the 1971 filing and later ruled that it was acceptable. The Insurance Department checked the 1981 filing for accuracy. The 1982 filing also received some review from Insurance Department. Just as with Arizona, Connecticut and Montana, Wisconsin satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors. For these reasons, Ticor has established that Wisconsin exercised its power to control Ticor's collective rate setting activity in that state.

## 5.

The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal's* adequate-supervision prong because the regulators in those states were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable. Even if the FTC is correct, its conclusions miss the point. Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable. Instead, the state action doctrine recognizes that states can implement anticompetitive policies, even policies that depend upon private actors such as Ticor, free from federal supervision where the state clearly articulates and actively supervises the policy.

The FTC's complaint counsel stipulated that Arizona, Connecticut, Montana and Wisconsin clearly articulated the anticompetitive policies at issue here. We have held that these states actively supervised those same anticompetitive policies. Thus, Ticor's setting of collective rates for title search and examination services in these four

states is immune from antitrust liability. We therefore must vacate the remainder of the FTC's final order.<sup>17</sup>

v.

Accordingly, we hold that Ticor's collective setting of rates charged for title search and examination services in Arizona, Connecticut, New Jersey, Pennsylvania, Montana and Wisconsin is immune from antitrust liability under the state action doctrine. As a result, the FTC lacked jurisdiction to bring an enforcement action against Ticor. We will thus grant Ticor's petition for review and vacate the FTC's final order in its entirety.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

<sup>17</sup> Because we hold that Ticor's setting of collective rates for search and examinations services in all six states is immune from antitrust liability under the state action doctrine, it is unnecessary to consider whether the same activity is also exempt from antitrust regulation under the McCarran-Ferguson Act as the business of insurance or is exempt from antitrust regulation as protected petitioning of state regulators under the *Noerr-Pennington* doctrine. See, e.g., *Southern Motor Carriers Rate Conference*, 471 U.S. at 55 n.17 (1985) (finding of state action immunity "makes it unnecessary to consider the applicability of [the *Noerr-Pennington*] doctrine to the petitioners' collective ratemaking activities.").

Furthermore, we decline to address Ticor's separation of powers argument. This is an attack on the administrative state. Whatever the merits of such an attack, Ticor has failed to present us with a fully developed argument; its argument that we should hold that the FTC operates in violation of the principle of separation of powers since it performs an executive function and yet is not subject to executive branch control is cursory at best, taking up less than two pages of its brief. As the Seventh Circuit wrote in a similar situation, "Brevity may be the soul of wit, but seismic constitutional change is not a laughing matter." See *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987).

## APPENDIX B

### UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-3787

TICOR TITLE INSURANCE COMPANY, CHICAGO TITLE  
INSURANCE COMPANY, SAFECO TITLE INSURANCE COMPANY  
(NOW KNOWN AS SECURITY UNION TITLE INSURANCE  
COMPANY), LAWYERS TITLE INSURANCE CORPORATION AND  
STEWART TITLE GUARANTY COMPANY,  
PETITIONERS

v.

FEDERAL TRADE COMMISSION,  
RESPONDENT

On Petition for Review of an Order  
of the Federal Trade Commission  
(FTC Docket No. 9190)

### SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON,  
MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,  
NYGAARD and ALITO, *Circuit Judges*, and RE, *Judge\**

The petition for rehearing filed by respondent in the above captioned matter having been submitted to the judges who participated in the decision of this court and to

\* Hon. Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation. Judge Re was limited to voting for panel rehearing.

all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Chief Judge Sloviter, Judge Becker and Judge Scirica would grant rehearing.

By the Court,  
/s/ WILLIAM D. HUTCHINSON  
Circuit Judge

DATED: Mar. 12, 1991

# APPENDIX C

## UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: JANET D. STEIGER, CHAIRMAN  
TERRY CALVANI  
MARY L. AZCUENAGA  
ANDREW J. STRENIO, JR.  
MARGOT E. MACHOL

Docket No. 9190

In the Matter of

TICOR TITLE INSURANCE COMPANY, A CORPORATION,  
CHICAGO TITLE INSURANCE COMPANY, A CORPORATION,  
SAFECO TITLE INSURANCE COMPANY, A CORPORATION,  
LAWYERS TITLE INSURANCE CORPORATION, A CORPORATION,  
AND  
STEWART TITLE GUARANTY COMPANY, A CORPORATION.

By the Commission, Commissioner Calvani and Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Machol not participating.\*

SEAL

DONALD S. CLARK  
SECRETARY

\* Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger did not register a vote in this matter.



IT IS ORDERED, that the Initial Decision of the Administrative Law Judge be adopted as Findings of Fact and Conclusions of Law except to the extent inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

## I.

For purposes of this Order, the following definition shall apply:

- a. "Title search and examination services" means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interest in the property.

## II.

IT IS ORDERED that each respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device in connection with the sale of title search and examination services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona, and Montana, from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

A. *Provided* that nothing in this Order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body.

## III.

IT IS FURTHER ORDERED that each respondent shall within thirty days after service of this Order deliver a copy of this Order to all its present officers, directors, and personnel having any responsibility in determining company prices as well as to the commissioner of insurance in each state listed in Paragraph II. of this Order.

## IV.

IT IS FURTHER ORDERED that each respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

## V.

IT IS FURTHER ORDERED that each respondent shall, within ninety days after service upon it of this Order, and at such other times as the Commission shall require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission, Commissioner Calvani and Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Machol not participating.\*

SEAL

/s/ DONALD S. CLARK

Donald S. Clark  
Secretary

\* Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger did not register a vote in this matter.

ISSUED: September 19, 1989

ATTACHMENTS:

Opinion of the Commission  
Statement of Commissioner Calvani Concurring in  
Part and Dissenting in Part  
Statement of Commissioner Azcuenaga Concurring  
in Part and Dissenting in Part  
Additional Statement of Commissioner Strenio

OPINION OF THE COMMISSION

By Strenio, *Commissioner*:<sup>1</sup>

I. STATEMENT OF THE CASE

On January 7, 1985, the Federal Trade Commission (Commission) issued a Complaint charging Respondent title insurers with a violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §45. More specifically, the Commission charged that the Respondents, operating through rating bureaus, had restrained competition in setting rates for title search and examination services and settlement services.

The gravamen of the complaint appears in Paragraph 11:

<sup>1</sup> The abbreviations used in this opinion are as follows:

ALJ: Administrative Law Judge

CC: Complaint Counsel

CCAB: Complaint Counsel's Answering Brief

CCRB: Complaint Counsel's Rebuttal Brief

F.: ALJ's Findings

ID: Initial Decision

RAB: Respondents' Appeal Brief

RRB: Respondents' Reply Brief

Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

Respondents, in turn, challenged the Commission's subject matter jurisdiction on the grounds that their activity was part of the business of insurance and therefore exempt from the FTC Act by reason of the McCarran-Ferguson Act. Respondents' answers also assert that the alleged anti-competitive practices are immune from antitrust prosecution by reason of the "state action" doctrine. Additional defenses raised on appeal are described below.

On December 26, 1986, Administrative Law Judge (ALJ) Needelman issued his initial decision, finding a law violation for activity in Connecticut and Wisconsin. The ALJ further found that search and examination by title insurers in connection with the issuance of a title insurance policy was not the "business of insurance."

This matter is now before the Commission on Respondents' Appeal Brief, to which Complaint Counsel has filed an Answering Brief. Additionally, Respondents have filed a Reply Brief and Complaint Counsel has filed a Rebuttal Brief.<sup>2</sup> In their Appeal Brief, Respondents argue that the

<sup>2</sup> Complaint Counsel requested leave to file a brief discussing the impact on this case of the Supreme Court's decision in *Patrick v. Burget*, 108 S. Ct. 1658 (1988). Respondents did not oppose this motion and requested leave to file a supplementary brief. The Commission granted the parties' requests and said briefs were filed.



ALJ erred in finding that Connecticut and Wisconsin did not “actively supervise” rating bureau filings. Further, Respondents argued that the ALJ erred in ruling that Respondents’ rating bureau activities are not the “business of insurance.” Additionally, Respondents argued that the ALJ erred in failing to apply the *Noerr-Pennington* doctrine to Respondents’ collective petitioning of state regulators; that Respondents’ rating bureau activities should be evaluated under a “rule-of-reason” analysis; and that the terms of the relief ordered by the decision were improper.

Complaint Counsel disagreed with the ALJ to the extent that he found “active supervision” existed in several states. Complaint Counsel also argued that Respondents failed to meet the first prong of the *Midcal* test (that there be a clearly articulated and affirmatively expressed state policy to displace competition) as to Pennsylvania and New Jersey. Complaint Counsel also would have fashioned differently the scope of the order proposed by the ALJ.

For the reasons set forth below, we affirm the ALJ in part and reverse in part.

In brief, we find that Respondents’ activities in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona,<sup>3</sup> and Montana are not beyond the purview of the federal anti-trust laws.

Respondents’ attempt to invoke the state action defense fails as to New Jersey and Pennsylvania because the statutes do not clearly articulate a state policy permitting a displacement of competition for charges to and retained by an attorney. Indeed, attorneys are specifically exempted from the statutory provisions invoked by Respondents.

<sup>3</sup> We also find that the doctrine of *res judicata* does not bar Commission action as to Arizona.

The attempt fails as to Connecticut, Wisconsin, Arizona, and Montana because Respondents’ private conduct was not actively supervised by the state. The active supervision prong of the state action defense requires that state officials have and exercise power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy rather than merely the party’s individual interests. We dismiss the complaint, however, as it relates to settlement or escrow services, because the record as to those services was not developed.

Further, we find that Respondents’ search and examination services are not the “business of insurance” and therefore are not exempt from antitrust challenge. These services, commonly provided by non-insurance entities, do not have the indispensable element of risk spreading or transfer necessary to qualify as the business of insurance.

Moreover, we hold that Respondents’ activities are not protected from antitrust challenge under the *Noerr-Pennington* doctrine. Rather, because of the “context and nature” of this activity, we conclude that it is commercial activity of the type that traditionally has had its validity determined by the antitrust laws. This is merely private activity to set rates collectively – the equivalent of horizontal price-fixing – not a collective attempt to persuade the state to require such ratemaking. We also find this activity inherently suspect and an appropriate candidate for *per se* analysis, under the reasoning we employed previously in *Massachusetts Board of Registration in Optometry, infra*.

## II. DESCRIPTION OF RESPONDENTS’ ACTIVITIES

Respondent insurers are engaged in the business of insuring the ownership of real estate for buyers and those



lenders (mortgagees) who rely on real estate as security for their loans. As part of the package of services they offer, Respondents provide search and examination and settlement or escrow services.<sup>4</sup> We adopt the ALJ's factual description of these activities. See ID at 12-45 and further discussion *infra*.

### III. STATE ACTION DEFENSE

One critical issue on appeal is whether the ratemaking activities here are beyond the purview of the federal antitrust laws by virtue of the state action doctrine.<sup>5</sup> As we stated in our decision in *New England Motor Rate Bureau, Inc.*, F.T.C. , Docket No. 9170, slip op. at 10-11 (Aug. 18, 1989) ("*New England*"), the state action doctrine attempts to resolve any conflicts that arise between the national economic policy in favor of competition, as embodied in the federal antitrust laws, and the principle of federalism. Under this doctrine, restraints on competition are protected from antitrust attack if they constitute "state action or official action directed by a state." *Parker v. Brown*, 317 U.S. 341, 351 (1943).

The Supreme Court has stated that a "gauzy cloak of state involvement" in private anticompetitive conduct is not sufficient to confer antitrust immunity. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). In *Midcal*, the Supreme Court

<sup>4</sup> We agree with the assessment of the ALJ that the complaint allegation respecting settlement or escrow services was an ancillary issue, barely addressed in this proceeding. The complaint is dismissed as to those services. See discussion *infra*. Our opinion therefore focuses on the search and examination issue.

<sup>5</sup> The state action doctrine is available in Section 5 cases applying Sherman Act standards. E.g., *Asheville Tobacco Board of Trade, Inc., v. FTC*, 263 F.2d 502 (4th Cir. 1959).

spelled out criteria that anticompetitive conduct undertaken by private entities must satisfy in order to qualify as exempt "state action": (i) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with regulation; and (ii) the conduct must be "actively supervised" by the state itself. *Id.* at 105-06; see also *Patrick v. Burget*, 108 S. Ct. 1658 (1988); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

#### A. CLEAR ARTICULATION (THE FIRST MIDCAL PRONG)

The only issue for determination as to Respondents' conduct in New Jersey and Pennsylvania is whether the state statutes give state action protection under the "clear articulation" prong of *Midcal* to collectively fixed rates charged for search and examination services when performed by attorney-agents.<sup>6</sup> Complaint Counsel argues that the statutes in Pennsylvania specifically exclude from the statutory definition of "fees" that are to be filed with the state insurance departments any charges that are paid to and retained by an attorney at law, whether such attorney is acting as an agent of a title insurance company or as an approved attorney of a title insurance company. Complaint Counsel asserts that in both states Respondents have fixed prices for charges paid to and retained by their attorney agents.

<sup>6</sup> The parties have stipulated, for the purposes of this litigation, that there has been active supervision in Pennsylvania and New Jersey sufficient to satisfy the second prong of the *Midcal* test for a state action defense.

Respondents argue, in turn, that special deference should be given to a state administrative agency's interpretation of its own regulatory statute, citing *Midcal* and other cases. RRB at 68, n.55. They thus rely on an amicus brief filed by the Pennsylvania insurance department and testimony by the New Jersey insurance department favoring their interpretation of the statute—that attorney agent fees are not excluded from the statutory definitions of fees. Respondents criticize Complaint Counsel's argument that the statute is "perfectly clear on its face." RRB at 70. They admit that the statutes "are susceptible to multiple interpretations." RRB at 70. But Respondents further argue that the meaning of the statutes cannot be discerned "without resort to the larger purpose and structure of the state statutes." RRB at 71. In both states, there is comprehensive regulation of the title insurance industry. RRB at 71-72. The "fee" definition which gives rise to Complaint Counsel's argument is said to be merely "an accommodation to members of the state bar who were concerned that legislation governing title insurance might be construed as regulating the legal fees of real estate attorneys." RRB at 72.

The ALJ found that the statutes were "ambiguous," ID at 91, but rested his holding that the first *Midcal* prong protected the activities of Respondents in these two states on the interpretation given the relevant statutes by state officials. He stated that Complaint Counsel's contrary assertion may have been more credible had it been supported by other evidence.

Crucial to Complaint Counsel's argument as to New Jersey and Pennsylvania are the following statutes. In New Jersey, the statute in controversy, *N.J. Stat. Ann.* 17:46B-1(f), reads in relevant part:

"Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and every other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" *shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.* (emphasis supplied)

In Pennsylvania, Section 701(5) of the Pennsylvania Insurance Company Law broadly provides that fees for title insurance are subject to regulation but contains the following proviso:

"Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" *shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract.* (emphasis supplied)

We find that the statutes in New Jersey and Pennsylvania do not clearly articulate a state policy permitting a



displacement of competition regarding these charges. Indeed, the statutes appear to do the opposite—attorney agents are singled out of the statutory scheme. Both statutes unambiguously exclude from their definition of “fees” that are regulated “any charges” paid to and retained by an attorney. Despite this, in both states Respondents have fixed prices for charges paid to and retained by their attorney agents. Since the statutes are clear on their face, the “plain meaning” rule of statutory construction must prevail. (We note in passing that no evidence of contrary legislative intent has been entered into the record.)

Further, deference to an agency’s interpretation comes into play only when the statute is ambiguous, *SEC v. Sloan*, 436 U.S. 103, 117-19. Deference is not appropriate merely because an interpretation is long standing, since an agency “may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.”<sup>7</sup> *Sloan*, 436 U.S. at 117-19 (1978).

#### B. ACTIVE SUPERVISION (THE SECOND MIDCAL PRONG)

To qualify for state action immunity, private conduct also must have been actively supervised by the state. *Midcal*, 445 U.S. at 105. The Supreme Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1986), stated that the active supervision requirement “serves essentially an evidentiary function; it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to

<sup>7</sup> We note further that the Pennsylvania insurance agency’s interpretation is relatively recent. In Pennsylvania between 1921 and 1975, rates filed by the rating bureau did not include attorney-agent charges. “Prior to 1975, the Pennsylvania insurance department obviously did not believe that charges made by attorney agents . . . were within the department’s regulatory control.” CCAB at 133.

state policy . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State.”

The Supreme Court recently elaborated on the requirement of active state supervision in *Patrick v. Burget*, 108 S. Ct. at 1658. There, a physician in Oregon alleged that competing physicians conspired to terminate his surgical privileges at the one hospital in a community. Plaintiff alleged that the defendants had initiated and participated in proceedings before the hospital’s peer-review committee that culminated in a recommendation to terminate the plaintiff’s staff privileges. These proceedings allegedly were undertaken for the sole purpose of reducing competition from plaintiff. The Court held that the state action doctrine did not apply to the challenged conduct because Oregon did not actively supervise the decisions of hospital peer review committees.

[T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests. \* \* \* The mere presence of some state involvement or monitoring does not suffice.

108 S. Ct. at 1663.

To establish active state supervision, it is not enough merely to show, as Respondents contend, that the state statute governing the anticompetitive activity provides some mechanism for regulatory oversight. There must be a



showing that the state actually exercised its authority. *Patrick v. Burget*, 108 S. Ct. at 1663. It is only through such an affirmative exercise that the state's intent can be discerned. Moreover, there must be a "program of supervision." *Id.* "The mere presence of some state involvement or monitoring does not suffice." *Id.* We understand this to mean that isolated instances of review—such as reviewing rate proposals submitted in 1990 and 1995 but not reviewing those submitted in the intervening years—will not suffice. Otherwise, a single instance of review illogically could shield anticompetitive behavior from antitrust challenge in perpetuity.

Thus, it is necessary to look at the entire program of supervision. We recognize that it would not be incumbent upon a respondent to show that every single piece of data filed with a rate commission was reviewed. Certainly, the use of sound sampling techniques would be permissible. It is reasonable to require, however, that the review activity be continuous. Consequently, our assessment of the regulatory activity in each state below will look at the review activity as a whole and seek to determine whether there was a general "program of supervision"—not whether each and every rate was reviewed.

On the other hand, isolated instances of review will not suffice—otherwise there could be no "program of supervision." The state's involvement in the challenged activity must be more than peripheral to qualify as active supervision. In *Midcal*, for example, the Supreme Court emphasized that the state had not established prices, reviewed the reasonableness of price schedules, regulated the terms of fair trade contracts, monitored market conditions, or engaged in a "pointed reexamination" of the program. 445 U.S. at 105-106. Rather, the state's enforcement activities merely had cast a "cloak of state involvement over what

[was] essentially a private price-fixing arrangement."\* *Id.* at 106.

These decisions demonstrate that a state official or agency must engage in an affirmative, substantive review of the challenged conduct before active supervision can be found. Such review ensures that the state agency has consciously considered the anticompetitive consequences of the activity for which private parties seek approval. As we stated in *New England*, \_\_\_ F.T.C. at \_\_\_, slip op. at 15, "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." Thus, we hold that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate. Moreover, there must be a program of supervision, not merely isolated instances of review.

This case also raises the question of who has the burden of proving active supervision. Complaint Counsel argues that although the ALJ recognized that the state action doctrine is a matter of affirmative defense, he impermissibly shifted the burden of proof to the government once Respondents demonstrated that "the state has a

\* Similarly, in *Patrick v. Burget*, the Court, observing that "[t]he mere presence of some state involvement or monitoring does not suffice," held that state action immunity could not be predicated upon a showing that Oregon health officials had licensing authority over the defendant physicians and that Oregon courts had some authority to review private peer group decisions on procedural grounds. 108 S. Ct. at 1663. Rather, a peer group decision would have been "actively supervised" by the state only if a state official or state court had, and had exercised, authority to review the merits of the peer group decision at issue. *Id.* (emphasis supplied). Of course, this reasoning is consistent with the earlier cited language that there must be a "program of supervision."

regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process." CCAB at 78, quoting ID at 94. Complaint Counsel complains that this standard forces it to prove a negative, a difficult task given the dearth of documentation that intrinsically exists in states that do not actively supervise.

The Supreme Court's decision in *Patrick v. Burget* holds that the proponent of the state action defense has the burden of demonstrating the actual exercise of regulatory authority by state officials. 108 S. Ct. at 1663 ("respondents . . . have [not] succeeded in showing that any of these actors reviews—or even could review—private decisions regarding hospital privileges"; "respondents have not shown that the [Board of Medical Examiners] in practice reviews privilege decisions"). We therefore conclude that the ALJ's evidentiary ruling was in error, and that Respondents, as the proponents of the state action defense, failed to meet the burden of demonstrating that state officials engaged in an affirmative, substantive review of their rate proposals. We think that Respondents' defense was not prejudiced by the ALJ's erroneous ruling. Both parties' introduction of evidence and examination of the witnesses at the administrative trial elicited more than adequate testimony upon which to base our decision.

We now turn to an examination of the individual states' supervision of the activity at issue.

### C. INDIVIDUAL STATES AND ACTIVE SUPERVISION

#### 1. Connecticut

The ALJ found no active supervision in Connecticut. He based his decision on a finding that the state officials had readily identified aspects of collective ratemaking that they themselves considered crucial but which were not being supervised at all. The ALJ found that collectively-filed rate increases were submitted with general justifications

that related merely to insurer profits. There was no critical examination of what lay behind those profit figures. "Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or 'commission expense' and the cozy relationship between insurers and attorney-agents that fuels this expense." ID at 97. In fact, the state insurance commission believed it was statutorily barred from doing anything about this. Thus, the state regulators "cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in ratemaking." ID at 97.

Respondents argue that the ALJ's "critical aspects" standard impermissibly and inappropriately second-guesses the qualities of supervision. RAB at 7. (The same argument is made as to Wisconsin, discussed *infra*.) Respondents state that a central goal of the state action doctrine "is to preserve for the states maximum flexibility in economic regulation." RAB at 8. Respondents admit, however, that "a state cannot simply authorize private parties to violate the federal antitrust laws . . ." RAB at 8. But Respondents argue that *Southern Motor Carriers* cited with approval the Areeda-Turner treatise which pointed out, in part, that "[t]he federalism concerns at the heart of *Parker* cannot be reconciled with federal court probing of the 'true' motives of state legislatures and agencies." RAB at 9. "There simply is no way to tell if the state has 'looked' hard enough at the data . . ." RAB at 10.

Respondents assert that the record demonstrates that there was an appropriate regulatory mechanism in place in Connecticut. RAB at 16. Even if any federal scrutiny of state supervision beyond ascertaining the existence of a regulatory mechanism is permissible, "that scrutiny should



be limited to a 'quick look' by the federal agency or court . . .". RAB at 19. A "quick look" in Connecticut assertedly demonstrates active involvement. Respondents then recite various facts that they believe show active supervision under the "quick look" test. RAB at 19-30.

Complaint Counsel argues, on the other hand, that when the rating bureau filed its first rate manual in 1966, it did not file statistical data to support the collectively-set rates.<sup>9</sup> CCAB at 109. Requests for clarification by the state regulators were not fulfilled. Nonetheless, this rate filing was effective until 1981.

Complaint Counsel asserts that the 1981 rate filing did not contain information from which the department could assess the reasonableness of insurer expenses. A 1983 filing was approved immediately, despite the fact that it lacked the supporting data required by statute.

Moreover, numerous endorsements and amendments were filed without supporting cost justifications. CCAB at 110. Although agreeing with the ultimate finding of liability by the ALJ, Complaint Counsel disagrees with his finding that minimal review was sufficient for "ancillary" filings such as these. F. 130 n.192. Complaint Counsel contends that the department did not consider these endorsement filings to be minor or ancillary. CCAB at 111 n.137. Charges of over \$100 per endorsement were not uncommon. Respondents even allegedly characterized one of the endorsement filings as "significant." RAB at 22. A minimal review standard is insufficient, according to Complaint Counsel. Finally, Complaint Counsel argues that the state did not have the "wherewithal" to examine

<sup>9</sup> We preface our examination of Complaint Counsel's argument by rejecting Complaint Counsel's proposed method for analysis as to all states insofar as it relies on its standard loosely based upon the Administrative Procedure Act. See our discussion in *New England*, \_\_\_\_ FTC at \_\_\_\_, slip op. at 15-16 n. 14.

insurer expenses, citing DiSanto Testimony 2739-40 and 2793.

In reply, Respondents argue that the 1966 rate filing was examined and the rating bureau responded to all inquiries. RRB at 39, RX 104 through 110. Respondents also contend that the other filings similarly were examined and proper justifications were filed.

The Commission finds that Connecticut did not meaningfully examine the rates submitted because it did not have the "wherewithal" to examine the critical area of insurer expenses. ID at 97, ID at 33-35. We adopt the ALJ's findings that the state insurance department suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates. F. 130, 132-33. For example, the ALJ found "no evidence that the department's request for justification relating to [the 1966 rate filing] was ever answered satisfactorily." F. 130. Further, the ALJ found that the state insurance official conceded that the department lacked the authority to control insurer expenses they knew were excessive. ID at 33-35.

The fact that the state regulators could not meaningfully regulate a critical component of the ratemaking process is fatal in and of itself to Respondents' state action defense. As the Supreme Court stated in *Patrick v. Burget*, the "mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. The Court's concurrent citation of 324 *Liquor Corp. v. Duffy*, 479 U.S. 333, 345, n.7, is instructive. In *Duffy*, the Court held that certain forms of state scrutiny of a restraint established by a private party did not constitute active state supervision because they did not "exercis[e] any significant control over" the terms of the restraint. *Id.* Accordingly, when the state regulator responsible for implementing the statutory scheme admits a lack of significant control over the restraint in question, the rates are the product of private action and the state action defense is inapplicable.



However, we disagree with the ALJ that so-called "ancillary" filings receive some sort of exemption or lower standard under the *Affidavit* test. Since there is no *de minimis* exception to the antitrust laws for price-fixing, the ALJ's minimal review standard for endorsements and amendments is contrary to the law. These were separate filings that should have been accorded state review. Although the use of scientifically sound sampling techniques to examine a rate filing might be reasonable, simply ignoring some filings because they do not involve generalized rate increases is impermissible. There must be a "program of supervision," not hit-and-miss review.

In sum, we conclude that the state of Connecticut did not actively supervise the rate filings at issue, and the state action defense does not apply. Respondents' arguments that in order to find a state action defense we should take merely a "quick look" at the state's regulatory supervision or be satisfied merely that any regulatory mechanism is in place, are put to rest by *Patrick v. Burget*. As discussed generally above, we must determine whether the state actually exercised its authority. The state did not do so here.

## 2. Wisconsin

The ALJ found no active supervision in Wisconsin. He stated that there "is little evidence that these [latent powers possessed by the insurance commissioner] were used to influence bureau rate making." ID at 55. "To illustrate, while the insurance commissioner was required to examine the Wisconsin Rating Bureau at regular intervals, no examination was ever made." ID at 55. Further, "no hearing has ever been held in Wisconsin on any insurance rate filing, and no rate suspension order has ever been issued." ID at 55. Essentially, "Wisconsin followed a hands-off policy in dealing with title insurers." ID at 97.

The 1971 rates, which represented historical rates charged before the formation of the bureau, were ap-

proved although supporting justifications were not filed until 1978. ID at 57. The 1981 filing, which represented a substantial rate increase of 11 percent, was accompanied by supporting data that was checked only for accuracy. The Office of the Commissioner of Insurance made no inquiry into insurer expenses, "notwithstanding recognition by the state office that title rates cannot be effectively regulated without such a [sic] scrutiny." ID at 58. A 1982 filing was given a " cursory reading," and the supporting materials "were not even checked for accuracy before the rate increase was accepted." ID at 59.

Respondents assert that as to the 1971 filing, the insurance department stated it would accept the filing contingent upon submission of a statistical rate justification when the rating bureau gained more experience in title insurance. RAB at 32. The state questioned the rating bureau "frequently" about its rate justification methods. RAB at 33. Eventually, the rating bureau hired an economic consultant. RAB at 33. As to the 1981 rate filing, Respondents contend that rating bureau and state insurance officials discussed the filing extensively. RAB at 36. The 1981 filing was "checked for mathematical accuracy," the proposed rates were compared with rates in neighboring states, and the effect on total revenues was analyzed. RAB at 36. Respondents argue that insurer expenses were examined. RAB at 38. For example, expense data was looked at. Transcript at 1777.

Complaint Counsel argues, in turn, that the first rate filing was in effect for over seven years without any supporting justification being provided. CCAB at 117. The department's review of the 1981 filing merely looked for mathematical accuracy. Mr. Wirtz of the insurance department admitted that the department did not have the resources to conduct reviews of rates to determine whether they were reasonable. F. 144. Wirtz Testimony at 1785-86.

The rating bureau also filed numerous endorsements and amendments between 1976 and 1984. CCAB at 121. No supporting cost information was provided for any of these amendment and endorsement filings. Nor was there any review of these filings. F. 142 n.217.

The Commission concludes that a law violation finding as to Wisconsin rests on several grounds. As with Connecticut, the state insurance department did not examine insurer expenses. A key official of the state testified as follows:

Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?

A. No.

Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?

A. Yes.<sup>19</sup>

Respondents' generalized assertions of review do not withstand scrutiny. We adopt the ALJ's evaluation that Wisconsin followed a "hands-off policy in dealing with title insurers." ID at 97. For example, the 1971 filing was in effect for seven years prior to the filing of any justification.

Inherent in the active supervision criterion is the notion that the review be meaningful. If review is not meaningful because a state regulator fails or is unable to evaluate whether rates are "reasonable" as required by statute, then the rates are the product of private and not state action:

And again, it was a state official [in Wisconsin] called by respondents who readily acknowledged that insurer expenses were simply not examined although the

state recognized how critical those expenses were in rate making. ID at 97-98.

For example, checking rates merely for mathematical accuracy under a statute that provides that rates must be reasonable is insufficient supervision. Further, nearly two dozen endorsements and amendments went into effect without being examined at all. However, even if the economic effects of these changes were not substantial, there is no *de minimis* exception to the antitrust laws.

### 3. Arizona

The ALJ found that while the state insurance department had a wide range of latent regulatory powers, the actual use of these powers was more hypothetical than real. F. 147-48. Between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. The ALJ found that there were "minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . ." F. 152. He advised that "[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." ID at 61, n. 233.

A 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, but there was "no convincing evidence that the rate was either justified by the bureau or reviewed by the state." ID at 61, n. 233. It appears that the 1968 rate, used from 1968 to 1983, apparently represented the rates charged by some members before the bureau was formed. *Id.*

<sup>19</sup> Wirtz Testimony at 1778-1779. See ID at 58.



However, on November 1, 1980, the Arizona Department of Insurance announced that a broad investigation of the rating bureau would be conducted. Before the investigation could be completed, a federal civil complaint challenging the propriety of the collective fixing of escrow rates was filed by the United States. The ALJ did not believe there were adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. He thought that the state validly was involved in what it considered to be a more immediate problem — the rating bureau's attempt to raise and then engraft collectively-set escrow fees onto the existing rate structure. He also believed it unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates. ID at 96. Consequently, the ALJ accepted the state action defense in Arizona.

Respondents agree with the ALJ that active supervision was present in Arizona. Disputing Complaint Counsel's chronology of events, Respondents state that the 1968 rate filing was "supportable under express statutory language permitting rates to be justified on the basis of the experience of the filing title insurer or rating organization or other title insurers," RRB at 29, citing Ariz. Rev. Stat. Ann Section 20-377. Respondents note that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971; the state insurance department requested these reports in 1977. RRB at 30. The rating bureau hired a rate consultant in 1977 and consulted with the Director of Insurance "and developed financial and statistical reporting plans for TIRBA members and sub-

scribers." RRB at 30. "By the end of 1978, ADI [consultant Arthur D. Little] had drafted its first profitability analysis of the Arizona title insurance industry, covering the years 1972-77 . . . and had submitted to the Director complete financial and statistical reporting plans, and financial reports for the years 1972 through 1977. RRB at 31. Other reporting and review processes are detailed by Respondents. RRB at 32-33.

Respondents also argue that the doctrine of *res judicata* bars the requested relief. In 1980, the Department of Justice filed a complaint alleging that filing of rates for escrow service by Title Insurance Rating Bureau of Arizona, Inc., (TIRBA) violated Section 1 of the Sherman Act. See *United States v. Title Insurance Rating Bureau of Arizona, Inc.*, ("TIRBA"), 700 F.2d 1247 (9th Cir. 1983). Respondents argue that the respondents in the instant proceeding were members of TIRBA and subject to the judgment finding liability in that case. The United States is also a party to both actions. The *res judicata* doctrine prohibits splitting a cause of action:

A party seeking to enforce a cause of action must present to the court, either by pleading or proof, or both, all the grounds upon which such cause of action is predicated. He is not at liberty to split up his demand and prosecute it by piecemeal or to present a part of the grounds upon which such cause of action is founded and leave the rest to be presented in a subsequent suit . . . " RRB at 36.

Respondents thus argue that the United States has initiated a second lawsuit under the same price-fixing theory used in *TIRBA*. The government may not now attempt to enlarge the relief it obtained in the original action or subject the insurers to additional claims that it could have pursued then. RRB at 36.



Complaint Counsel argues that there was no active supervision in Arizona. The March 1968 filing was filed without any supporting data. From 1968 to 1981 the rating bureau submitted numerous rate changes and endorsement filings, none of which contained any cost or expense data. Complaint Counsel states that in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are “deemed” to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the department of insurance, which was then in a transition period, “accepted the filing without any question and without any justification thereof.” CCRB at 29. The state insurance official admitted that no review was conducted between 1973 and 1982. Barberich Testimony at 2289. The department head also could not recall any specific department review of various amendments. Accepting prevailing rates is not permissible, Complaint Counsel argues, for it is no excuse that the prices fixed are themselves reasonable, citing *Catalano Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). See also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

Complaint Counsel also contends that whatever supervision occurred with regard to collectively-set escrow fees does not, as a matter of law, remedy the lack of active supervision over price-fixing for search and examination services. CCAB at 86. Further, Complaint Counsel argues that, as in Wisconsin and Connecticut, the state did not examine crucial aspects of the ratemaking process, i.e., insurer expenses. CCAB at 87.

Complaint Counsel also asserts that *res judicata* does not bar relief in Arizona. “Respondents interpret the doctrine of *res judicata* and its rule against splitting a cause of

action to mean that once defendants have been found guilty of price-fixing for one product or service, they become insulated from attack with respect to any other contemporaneous price-fixing that could have been raised in the first action. This contention is wrong.” CCRB at 32. Complaint Counsel believes that the doctrine against splitting a cause of action prevents bringing multiple lawsuits using different legal theories to remedy the same wrong. CCRB at 33. This case assertedly does not involve use of a different legal theory to remedy the same wrong, i.e., price-fixing on escrow services. This is a different wrong—price-fixing on search and examination services.

The Commission finds a violation of Section 5 of the FTC Act as to Arizona because there was no active supervision. The Commission also finds that the doctrine of *res judicata* does not bar this lawsuit. First, between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. No active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it. The ALJ found that there were “minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . .” F. 152. He advised that “[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject.” ID 61, n.233. As stated above, there is no *de minimis* exception to the antitrust laws. While the record is said to be inconclusive on the kind of review, if any, that occurred, the burden of establishing this defense was on Respondents. See discussion of proponent’s burden, *supra*, as set forth in *Patrick v. Burget*, 108 S. Ct. at 1663.

Although a 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, there was “no convincing evidence that the rate was either justified by the bureau or reviewed by the state.” ID at 61, n.233. It appears that this rate, used from 1968 to 1983, represented the rates charged by some members before the bureau was formed. *Id.* Even if one assumes the historical rates were reasonable, this is not a defense under *Catalano* and related cases. A state may not merely allow private parties to fix prices without active state supervision. When a state allows a historical rate to go into effect unexamined, it has done just that.

Nonetheless, the ALJ accepted the state action defense because the state was involved in the rating bureau’s attempt to raise and then engraft collectively set escrow fees onto the existing rate structure. ID at 61-63, 96. We disagree. A state may not pick and choose which classifications of rates it is going to supervise actively and which it will ignore. There must be a “program of supervision,” under which the state actively supervises all types of rates. “The mere presence of some state involvement or monitoring does not suffice.” *Patrick v. Burget*, 108 S. Ct. at 1663.

The lack of active supervision can be seen in a variety of instances. For example, Respondents state that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971. Yet the fact remains that the state insurance department requested these reports only in 1977. RRB at 30. The rating bureau hired a rate consultant in 1977. But it was not until the end of 1978 that the consultant had drafted the first profitability analysis of the Arizona title insurance industry, covering the years 1972-77. Thus, there was a substantial time during which there could not have been active supervision. For example, while the original rates were filed in 1968, the rating

bureau did not even begin to initiate a submittal process until hiring outside help in 1971.

Further, in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are “deemed” to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the Department of Insurance, which was then in a transition period, “accepted the filing without any question and without any justification thereof.” CCRB at 29. This lack of substantive review does not comport with the *Midcal* active supervision requirement.

We hold also that the doctrine of res judicata does not bar the Commission’s action as to Respondents’ activities in Arizona. Respondents argue that “the United States has initiated a second lawsuit under the same price-fixing theory relied upon in *TIRBA*, premised upon the same rate filing activity by the same rating bureau during the same period.” RRB at 37. This argument is based on an erroneous recitation of the facts.

“In general, the doctrine of res judicata serves the interest of judicial economy and finality in disposition of disputes by precluding parties to a judgment and their privies [footnote omitted] from relitigating the same ‘cause of action.’” *Durhan v. Neopolitan*, No. 88-2108, slip op. at 5 (7th Cir. April 20, 1989). In order to determine whether res judicata applies because of the final *TIRBA* order concerning escrow fees, we must decide if the cause of action which is asserted in the instant case is the same cause of action that was advanced in *TIRBA*.

Federal courts increasingly have adopted a “transactional” analytical approach to res judicata.<sup>11</sup> *Durhan v.*

<sup>11</sup> This is in comparison with the “proof” or “evidence” approach, under which a second action is barred where there is identity of facts essential to the maintenance of both cases. “Under most factual set-



*Neopolitan*, slip op. at 6. In the Restatement (Second) of Judgments § 24 (1982), causes of action are the same if they arise from the same "transaction" or "common nucleus of operative facts." *Id.* § 24 at 199<sup>12</sup>. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Id.*

The record shows that the activity at issue here is separate in time, space, origin and motivation from the activity at issue in *TIRBA*. As to the instant case, the 1968 rate filing involving search and examination rates was in effect from 1968 to 1983. Wilkie 2074-77, ID at 61, n.233. The 1968 rate filing for search and examination rates had as its basis "a meeting or series of meetings" (prior to the 1968 filing) involving all the companies issuing title insurance policies. Wilkie 2113. Yet, there was no convincing evidence that the 1968 rate filing was either justified by the rate bureau or reviewed by the state before it went into effect. ID at 61, n. 233. *See also* Wilkie 2112.

In comparison, it was not until 1977 that the title insurance code of Arizona was amended to include escrow services, the type of services at issue in *TIRBA*. Wilkie at 2090-91. The escrow rates were first filed in 1977 in reaction to that legislative change. Wilkie 2107, 2121; Barberich 2266. By then, the search and examination rates at issue herein had been in effect for almost a decade. When

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tings, the transactional approach will result in broader preclusive effect since several theories of recovery may emanate from the same transaction without complete identity of the evidence necessary to sustain each theory." *Durhan v. Neopolitan*, slip op. at 6.

<sup>12</sup> The Supreme Court, among others, has referred with approval to the conceptual framework of the Restatement (Second) of Judgments § 24 (1982). *See Nevada v. United States*, 463 U.S. 110, 130, n.12.

the 1977 escrow filing was submitted, it was a separate schedule from the search and examination schedule. Wilkie 2132. And when the escrow schedule was refiled as amended in 1978, the search and examination rate structure stayed the same. Wilkie 2099.

These facts show that the Respondents' activities as to escrow fees and search and examination fees are not so related in time, space, origin or motivation as to justify preclusion of the Commission's lawsuit. For example, the period during which the Respondents agreed to submit collective search and examination rates predated the filing of escrow rates by about a decade. The search and examination rates were permitted to go into effect and remained in effect in the absence of active supervision for many years prior to the legislative change that led to the collective filing of escrow rates. And when the escrow rates were filed, there was no effect on the search and examination rate structure. We conclude, therefore, that the doctrine of res judicata does not bar the Commission's lawsuit in Arizona as to search and examination fees.

#### 4. Idaho

The ALJ found active supervision in Idaho. He stated that the rating bureau was financially audited by the state insurance department. F. 164. A 1975 rate filing was referred to the department's outside consultant, who provided an analysis. F. 168. The state insurance department also held a public hearing on a variety of matters such as minimum rates. F. 168. A 1980 across-the-board rate increase resulted in the department subpoenaing data from the bureau members relating to insurer expenses and the outside consultant analyzing data. F. 168. The ALJ found that there was "no convincing evidence that the Idaho Insurance Department has failed to consider any insurer expense which might impact on rates, including agent retention expense." F. 169. We note, however, that the ALJ



found that "[m]iscellaneous rate adjustments, forms, and endorsements were filed and approved throughout the period 1974-84 with apparently little or no review by the insurance department." ID at 68, n. 259, citing Mitchell Testimony at 2925-39, Fraundorf Testimony at 3434-42, CX 62A-71B and RX 207-223.

Respondents generally agree with the ALJ's analysis. Respondents state that Complaint Counsel's "preoccupation with the Bureau's filings of miscellaneous forms and endorsements and specialized policies is . . . misguided." "Complaint Counsel's implication that lack of recall, years after the fact, suggests lack of regulatory supervision, is specious. Moreover, Complaint Counsel have made no showing that these endorsements had any real economic impact on title insurance consumers or companies." RRB at 51.

Complaint Counsel argues, however, that "an official of the rating bureau conceded at trial that the department had not conducted any inquiry into the reasonableness of the title insurers' expenses which were used as the basis for filing the rate increase." CCAB at 104, citing Mitchell Testimony at 2924. Complaint Counsel also argues that numerous endorsements and amendments were filed, CCAB at 104, and were approved almost as soon as they were filed, in violation of the statutory 30-day waiting period, and despite the fact that they were unsupported by any justification data. "The department's analyst who approved the rates testified that he was unaware of what work a title insurer had to perform before the various endorsements could be issued. In addition, he was unaware of the costs or revenues associated with issuing any particular endorsement." CCAB at 104-05. Thus, Complaint Counsel argues, a \$25 charge for issuance of a variable rate mortgage endorsement (which had been rejected in Connecticut because it represented a 25 percent increase in

the cost of a \$50,000 mortgage title insurance policy, without providing any apparent additional coverage) was accepted in Idaho "without any justification and without any questions or review by the department." CCAB at 106.

Commissioners Strenio and Calvani would find that liability exists in Idaho because of the state's failure to actively supervise the filing of endorsements and amendments.<sup>13</sup> Complaint Counsel argues persuasively that there was no review of these filings and, as held above, there is no *de minimis* exception to the Sherman Act. While sampling techniques used within rate filings may be permissible, a state reviewing agency may not unilaterally exempt an entire category of filings from its scrutiny. In effect, the state here was saying that it would actively supervise rates for apples but not for oranges. Perhaps its rationale was that the endorsements were less significant economically. However, when a per se violation of the antitrust laws for price-fixing is involved, one need not judge economic impact, e.g., whether the fixed rate is reasonable. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). One is not required to evaluate whether a fixed price on what may be a small item crosses some threshold of economic concern. There is no necessity to make a "minute inquiry" into the substantial nature of a fixed price. *Id.*

### 5. Montana

The ALJ found that the Montana Rating Bureau made only one major rate filing, in 1983. "[The] bureau's filing included a commitment to gather statistical data and

<sup>13</sup> The Commission was evenly divided on the finding of liability as to Idaho. Under the circumstances, the Commission has determined to dismiss the complaint allegations as to Idaho. The reasoning in this paragraph is adopted only by Commissioners Strenio and Calvani. See the separate statement of Commissioner Arcuena.

undertake a profitability study for all underwriters and agents in Montana during the year 1984 in order to provide further support for the rate." F. 176. "In connection with the February 22, 1983 filing, a representative of the Montana Rating Bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past six years. There is no evidence that this material was ever provided." F. 177. The ALJ found, however, that "Montana insurance officials examined agent retention expenses both before and after the creation of the Montana Rating Bureau, and there is no evidence that the state's method of dealing with the problem, *i.e.*, by giving the insurance commissioner specific authority to disapprove excessive rates, has been ineffectual." F. 178. Montana also had a statutory provision permitting "file and use" rates. F. 174.

The ALJ found also that in Montana, "where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau." ID at 96.

Respondents state that the 1983 rate filing, upon which Complaint Counsel focuses, "was personally reviewed and accepted for filing by a Department official in charge of title insurance rate filings." RRB at 32. "The Department concurred in MTISO's [the rating bureau] plan to supply additional financial data on title insurance industry profitability to supplement the information presented in the rate filing." RRB at 33. Respondents argue that the 1983 rate

filing "was, in fact, supported by information discussing the declining profitability of the title insurance industry." RRB at 33. "The filing conveyed MTISO's plan for developing additional data that would allow the Department to reexamine the rates filed." *Id.*

Complaint Counsel states that in Montana, title insurance rates can be used as soon as they are filed.

In line with this hands-off approach to regulation, from 1974 to November, 1984, the insurance department had only one full-time employee in the Rates and Forms Section of the Property and Casualty Division, and that employee was responsible for all rate and form filings in all property and casualty lines of insurance as well as in miscellaneous other lines, such as title insurance. As the evidence illustrates, that employee's duties did not involve substantive rate review; only insurance forms had to be approved. CCAB 89.

The 1983 rate filing "was stamped approved in Mr. Stratton's [director of the title insurance rating bureau] presence without any discussion of the rates it contained." CCAB at 89. Complaint Counsel also argues that the "filing on its face acknowledged that it did not contain the support material required by statute . . ." CCAB at 89. "The supporting material was never provided." CCAB at 90.

Complaint Counsel argues that the controlled business hearings and the enactment of a new statute, relied upon by the ALJ, cannot support a finding of active supervision. Controlled business hearings, which were held three years before the formation of the rating bureau, involved hearings on restrictive legislation designed to keep controllers of business—attorneys, real estate brokers, and lending institutions—out of the title insurance business. Complaint Counsel argues that such hearings cannot substitute for supervision of the price-fixing in question.



The Commission concludes that Complaint Counsel has the better of the argument and finds no active supervision in Montana. For example, the record demonstrates that rates from the 1983 filing went into effect without being examined. F. 177. There is no evidence that the additional data requested by the state was ever provided. *Id.* This does not constitute a "program of supervision." The state's subsequent enactment of legislation cannot cure the legal violation that occurred earlier. Otherwise, states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute.

#### 6. Ohio

In Ohio, the ALJ found that Complaint Counsel failed to prove the complaint allegation that Respondents used the rating bureau to establish uniform charges for search and examination services. Between 1972 and 1983, all rates filed by the Ohio rating bureau covered "risk" only. None of the filings purported to contain charges for search and examination services or settlement services. F. 158. Respondents independently set and published charges for the latter and they were not submitted to the Ohio Department of Insurance. F. 160. Complaint Counsel's entire case on the search and examination issue rested on the supposition that because "risk" rates were justified on the basis of rate of return on total capital they must of necessity be inflated to include such non-risk elements as the cost of conducting search and examination and settlement services.

Respondents argue that if the settlement charges and the search and examination charges assessed independently by Respondents actually covered the expenses associated with delivering such services, then the subsidization theory

urged by Complaint Counsel "disintegrates." RRB at 57. "Since Complaint Counsel did not even attempt to prove that the revenues from search/examination and settlement persistently failed to cover the expenses of providing such services, their theoretical argument about the multifaceted role of the risk rate in Ohio has no record support." RRB at 58.

Complaint Counsel's challenge to Respondents' conduct is that Respondents used the collectively-set risk rate as a vehicle to obtain their desired level of profit on all their activities. The collectively-set risk rates filed with the insurance department were established by the rating bureau through a rate of return on total capital method of accounting. Under this method, the capital, revenues and expenses used to compute the risk rate include capital, revenues, and expenses attributable to "nonrisk" activities, "by far the most important of which are search and examination services and settlement services." CCAB at 94. Thus, the rating bureau determined what increases to file in the collectively-set risk rates by calculating how much additional revenue was necessary to achieve a targeted rate of return on total capital for all of its members' Ohio operations. "The 1981 rate filing was designed to assure the title insurance industry a rate of return on total capital of 7.52%." "Although this price-fixing agreement did not result in uniform charges for search and examination and settlement services, the agreement clearly had a substantial impact on competition in those markets." CCAB at 96.

The Commission finds that there is no liability in Ohio. Although Complaint Counsel's argument has theoretical appeal, Complaint Counsel failed to establish a nexus, other than on a theoretical basis, between the collective filing of risk rates and the fees for search and examination and settlement services.



#### B. ESCROW AND SETTLEMENT SERVICES

The ALJ states that it "became apparent at the outset of this proceeding that the complaint allegation respecting settlement or escrow services was an ancillary issue." ID at 3. "[B]oth sides directed their efforts almost exclusively to the search and examination issue."

We hold that the complaint should be dismissed in its entirety as it relates to settlement or escrow services. The ALJ is correct that little attention was paid to this aspect of the complaint. Indeed, Complaint Counsel did not clearly appeal the ALJ's adverse rulings in this area. Thus, we conclude that no case has been made as to these services.

#### IV. BUSINESS OF INSURANCE

Broadly stated, the Commission also must determine whether Respondents' business was the "business of insurance" and therefore exempt from antitrust challenge under § 2(b) of the McCarran-Ferguson Act, 39 Stat. 34, as amended, 61 Stat. 448, 15 U.S.C. § 1013(b). The initial decision describes Respondents' "insurance" activities in full detail and also analyzes the general activities of the title insurance industry. We adopt this description by the ALJ and also conclude that Respondents' collective rate setting for search and examination services is not exempt from antitrust challenge. We highlight some of the more pertinent facts below.

Preliminarily, it is important to understand the nature of the antitrust exemption at issue. The statutory exemption itself has been discussed in detail by the Supreme Court in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 203 (1979), and also has been applied by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, the Supreme Court, after noting that antitrust exemptions are to be construed narrowly, stated that the exemption is for the "business of insurance," not the "business of insurers." Referring to *SEC v. National Securities, Inc.*, the Court noted:

The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. *SEC v. National Securities*, 393 U.S. 453, 459-60 (emphasis in original.)

In *Royal Drug*, the Supreme Court adopted a three-pronged test. Whether a particular practice is the business of insurance depends first on whether the practice has the effect of transferring or spreading a policyholders' risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. See also *Pireno*, 458 U.S. at 129.

The Supreme Court noted, with regard to the first prong, that the "primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Royal Drug*, 440 U.S. at 211. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Id.* (citation omitted). Underwriting or spreading of risk was said to be "an indispensable characteristic of insurance . . .". *Id.* at 212.

The Pharmacy Agreements in *Royal Drug* were not part of the business of insurance because they did not “involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield.” *Id.* at 214. The Court, agreeing with the United States position that “there is an important distinction between risk underwriting and risk reduction . . .”, *id.* at 214, n.12, noted that the cost savings arrangements at issue “may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the ‘business of insurance.’” *Id.* at 214. Thus, the Pharmacy Agreements were held to be legally indistinguishable from “countless other business arrangements that may be made by insurance companies to keep their costs low” such as a contract between the insurance company and a drug chain whereby its policyholders could obtain drugs under their policies only from stores operated by the chain. *Id.* at 215.

As to the second prong, regarding the policy relationship between the insurer and the insured, the Court noted that Congress, in enacting the McCarran-Ferguson Act, had been concerned with the “‘relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the ‘business of insurance.’”” *Id.* at 215-16, quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969). As to the Pharmacy Agreements in question, the Court stated:

At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But in that sense, every business decision made by an in-

surance company has some impact upon its reliability, its ratemaking, and its status as a reliable insurer . . . *Id.* at 216-17.

As to the third prong, whether the practice was limited to entities within the insurance industry, the Court referred extensively to the Act’s legislative history, noting that in enacting McCarran-Ferguson, “the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws.” *Id.* at 221. This was attributed to the “widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation.” *Id.* The Court adopted the explanation from one of the early House Reports that “[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors.” *Id.* at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943). Further, the Court noted an underlying rationale for the exemption was that to “prohibit combined efforts for statistical and rate-making purposes would be a backward step . . .”. *Id.* at 221-22 (citation omitted).

In *Union Labor Life Ins. Co. v. Pireno*, *supra*, the Supreme Court reconfirmed the three-pronged test from *Royal Drug*. The Court held that the arrangement in question between an insurance company and a number of chiropractors was not part of the business of insurance since the practice was aimed at reducing the cost of satisfying claims, not spreading risk. Also, the Court explained that the practice must be “logically and temporally” connected to the spreading of risk. 458 U.S. at 130.<sup>14</sup>

<sup>14</sup> In addition to these Supreme Court decisions, a Court of Appeals addressed the conduct of Respondents herein in a similar context in



Turning now to Respondents' arguments, they assert that the ALJ improperly relied upon just the first "risk spreading" *Royal Drug* criterion in ruling on the business of insurance exemption issue.<sup>15</sup> RAB at 45. They cite *Pireno* for the proposition that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. Respondents argue that the McCarran Act exemption may apply where the second and the third criteria are satisfied but the first is not.

Respondents then argue that in any event, the search and examination process in title insurance satisfies the first "risk spreading" criterion. They cite *Pireno* for the proposition that the "fundamental principle of insurance [is] that the insurance policy defines the scope of the risk assumed by the insurer from the insured." 458 U.S. at 131. In title insurance, this role of identifying the risk to be insured is performed through the search examination. "Since every real estate title is unique, an insurer cannot reliably assess on an actuarial or statistical basis whether the purchaser will be vested with a fee simple . . .". RAB at 48. Thus, Respondents think there is a "logical and temporal" relationship between title search and examination and the underwriting of title insurance risk, because the search has to precede the issuance of the insurance. The process of checking and perfecting title is a substitute for the risk; it eliminates or at least minimizes it. RAB at 53, n.44. Respondents would thus conclude that the fees for performing this risk assessment can be set collectively.

Respondents also think the ALJ too narrowly interpreted the legislative history of McCarran. Although the

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*United States v. Title Ins. Rating Bureau of Ariz.* ("TIRBA"), 700 F.2d 1247 (9th Cir.), cert. denied, 104 S. Ct. 3509 (1984).

<sup>15</sup> A recitation of Complaint Counsel's arguments would be superfluous given our substantial agreement with those arguments.

Supreme Court in *Royal Drug* stated that the primary purpose of the McCarran Act was to permit cooperation in insurance ratemaking, the ALJ concluded that the Act "cannot be interpreted so as to cover insurance company ratemaking that is unrelated to a pooling of risk experience" among insurance companies. ID at 83. Respondents dispute this by citing *SEC v. National Securities*, 393 U.S. 453 (1969) for the proposition that "the fixing of rates is part of this [insurance] business." 393 U.S. at 459.

Respondents then assert that *Royal Drug*, following *National Securities*, stated that there was a dual purpose behind McCarran: the primary purpose was to protect the states' power to tax and regulate insurance against Commerce Clause attack, while the secondary purpose was to carve out a limited antitrust exemption for insurance company activities. RAB at 55-56. Thus, quoting the Supreme Court in *Royal Drug*, the Act "should be read as protecting the right of the States to regulate what they traditionally regulated." 440 U.S. at 218-219, n.18. Further, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of . . . [Congress] . . . was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.* at 221. Respondents assert this language means that insurance ratemaking was an exempt category of conduct wholly apart from the question of risk spreading. RAB at 56, and n.45.

Respondents take the position, however, that they "need not and do not base their McCarran Act arguments on any assertion that the Act constitutes 'a blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.'" RAB at 58, n. 47. "The activity challenged is ratemaking with respect to an insurance function that is

directly related to the insurer's decision concerning what risks will be assumed under its policies." *Id.*

We now discuss some of the more pertinent facts in the proceeding. We agree with the ALJ's assessment that title insurance policies basically are assurances to the buyer or lender that defects in title discoverable from examining the public record have been brought to the attention of the buyer or lender so they can cure the defect or decide not to go ahead with the deal. ID at 18. A secondary purpose of title insurance, going beyond the scope of an abstract or attorney's opinion,<sup>16</sup> is to protect the buyer or lender from hidden or "off-record" risks not discoverable from examination of public records (such as missing heirs, etc.). ID at 18. But the fees for such protection are separate from the search and examination fees involved herein.<sup>17</sup>

A title insurance policy may be based on a search and examination conducted by an independent abstractor or an unaffiliated independent attorney. ID at 19. Most title insurance policies, though, involve searches and examina-

<sup>16</sup> An attorney's opinion is a substitute in many states for title insurance, especially in New England and the Southeastern U.S. ID at 18, n.53. The attorney's opinion, like title insurance, involves a critical review of the public records and an interpretation of the legal significance of documents uncovered in the search. ID at 15.

<sup>17</sup> An exceptions schedule to the title report or title policy will contain "off-record" exceptions, meaning the insured will not be covered under those conditions. For example, excepted from coverage will be "[r]ights or claims of parties in possession not shown by the public records" or "[e]asements or claims of easements not shown by the public records." F. 87. Some of these exceptions may be removed by off-record procedures. F. 88. But removal of these off-record exceptions also requires the purchase of extended coverage. F. 88. The charges for extended coverage are not covered by the search and examination fees at issue.

tions made by attorney-agents, approved attorneys<sup>18</sup>, or employees of the title insurers. ID at 19. A person may wear more than one hat in this business, e.g., an approved attorney may also function as an unaffiliated independent attorney.

Regardless of the form in which the buyer or lender is assured of good title (e.g., through attorneys' opinion, or title "insurance") the condition of the title is determined by essentially the same search and examination process. Further, the objective is the same under all forms or processes—to uncover significant impediments to ownership. ID at 23. The nature of the search and examination service, then, is to provide a statement of the status or condition of title and to call to the attention of the buyer or lender defects discoverable from the public records. ID at 24. In Respondents' view, this process determines what risks they are willing to "insure." ID at 24.

Respondents' basic argument is that the search and examination undertaken prior to the issuance of the title insurance policy is "underwriting" because it is on the basis of the search and examination that risk is identified and a decision is made whether to accept or reject it. ID at 28. We agree with the ALJ's assessment that this open-ended definition of underwriting is illogical because the search and examination conducted for title insurance purposes is virtually the same as the process used for the purposes of rendering abstracts and attorneys' opinions. Further, regardless of the purpose, search and examination is carried out by a corps of searchers, abstractors, conveyancers, attorney-agents, and approved attorneys who move freely from one form of title work to another, without a perceptible difference in what they do. ID at 29.

<sup>18</sup> Approved attorneys are independent attorneys who have been formally designated by Respondent insurers as qualified to conduct a search and examination. ID at 20.



Respondents' effort to expand the definition of underwriting is unpersuasive because the record evidence is that this is an industry in which standard forms predominate, company manuals prescribe a set routine, and the basic approach of the title insurance business is not to assume any significant risks uncovered by searchers and examiners. ID at 29. The search and examination undertaken prior to the issuance of insurance is intended to provide an accurate search of the public records for title defects, which are to be cured by the insured or excepted from coverage. ID at 30. Thus, we conclude that the search and examination function is not underwriting in the sense of assuming and spreading risk among a universe of insureds. ID at 30. *Cf. Royal Drug*, 440 U.S. at 205.

Instead, the guiding principle of title insurers is to avoid risk. Operating manuals throughout the industry are replete with admonitions that risks are to be excepted from coverage. ID at 30. These operating manuals instruct agents that they must be followed or the agents may be liable for damages. ID at 30, n.109. Standard title reports contain standard limitations in the form of a general notice that the policy will not insure against loss from any title defects listed in an exceptions schedule attached to the report, or any new title defect arising between the date of the report and satisfaction of the standard requirements. ID at 32.<sup>19</sup> The title insurers strictly require their agents and employees to list all enforceable or even doubtful title defects, liens, and encumbrances in the exceptions schedule (called Schedule B). ID at 32.

Respondents claim, though, that agents and employees, as searchers and examiners, exercise underwriting discretion in writing title reports or final policies. However, the

<sup>19</sup> The "standard requirements" are the payment of the purchase price for the property, recordation of the deed, and payment of the title insurance premium.

testimony revealed such "discretion" is limited to insignificant defects such as ancient and patently unenforceable mortgages. ID at 33. This is consistent with the finding that there is no credible evidence that Respondents have incurred any significant losses traceable to the exercise of discretion by searchers and examiners in eliminating minor title defects. ID at 33. Additionally, the insurer-agent agreements and company directives contain explicit requirements that the agent, without discretion, must include all material title defects as exceptions to the policy. ID at 33. The "common rule in the title insurance industry is that enforceable title defects appearing on Schedule B of the title report will inevitably appear as specific exceptions on Schedule B of the final policy unless the insured takes specific steps (for example, payment of mortgage money or posting of bonds to satisfy existing tax or judgment liens) to cure them." ID at 35. *See also* ID at 36-38.

It follows, then, that the most significant "risk" that title insurers face is whatever peril attaches to conducting a competent search and examination of the public record. ID at 38. But this "risk" has nothing to do with the notion of risk as it is commonly encountered in casualty insurance. In the latter, there is a risk that an unforeseen or uncontrollable event will affect the insured. In search and examination work, the risk is that the title searcher will not perform competently. Thus, the event triggering compensation here is something caused by or under the control of the title insurer.<sup>20</sup> Even this "risk" of incompetence (a

<sup>20</sup> *Cf. the Royal Drug Court's* definition of insurance: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Royal Drug*, 440 U.S. at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943).

"risk" indistinguishable from that incurred by all employers in all lines of enterprise) is reduced, though, by the contractual relationship between insurers on the one hand, and abstractors, independent attorneys, etc. on the other, which places upon the latter liability for negligence in conducting the search and examination. ID at 38.

It is only in a rare number of cases that Respondents may give affirmative coverage if an uncovered title defect is not cured. The risk must be calculable and low, and indemnities or extra premiums are required. Agents and branch employees of title insurers are prohibited from giving such affirmative coverage without prior approval from supervisory or home office staff (and we emphasize that this relates only to a limited set of circumstances). ID at 39, and n.141 at 39. Again, we stress that these rare circumstances properly cannot be subsumed under the search and examination ratemaking at issue since additional fees are charged for such affirmative coverage.

Given these herculean efforts to eliminate risk, it is not surprising that the trial elicited no evidence that any title insurer has incurred any loss by reason of an agent's decision to issue insurance without obtaining prior approval despite the presence of a known title defect. F. 95. Similarly, there is no evidence on the record that in those rare instances when an insurer decides to issue insurance despite the existence of some uncovered risk that this involves a pooling of risk experience or represents an actuarial assessment of risk by an individual insurer. ID at 40, F. 114.<sup>11</sup>

<sup>11</sup> Compare *Royal Drug*, 440 U.S. at 221 ("[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages.") with F. 114: "there is no evidence that any title insurer, whether operating through a rating bureau or otherwise, sets rates by referring to actuarially determined loss experience." According to the New Jersey Title Insurance Rating Bureau, "it is not possible to set up an actuarial standard for risk assumption based on loss ex-

Consequently, there is a sharp distinction between the two things title insurance companies do: (1) provide a service informing buyers and lenders about known title defects, and (2) in a small number of cases indemnify buyers or lenders under separately charged "risk rates." The bifurcated nature of the business is evident from industry rate manuals that separate out a relatively small charge (the "risk rate") for indemnification. ID at 41. The separate risk rate is not challenged in this proceeding (except in Ohio, as discussed *supra*). The risk rate stands in marked contrast to the relatively substantial charge for providing information based on the search and examination. ID at 42.

Significantly, title insurance rates are not set collectively through rate bureaus in order to facilitate intra-industry cooperation in the pooling of risk information. ID at 44. The evidence shows that where a title insurance rating bureau establishes either an inclusive rate or a separate rate schedule for search and examination, the cost studies used to support these rates dwell mainly on the cost of carrying out the search and examination, including the fixed costs of title plants and employees staffs. ID at 44; Plotkin Testimony at 2462. "This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic tenet of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present." ID at 86-87. Uniform rates are established that apply to all members despite any cost dif-

ference. Risks in the title insurance industry are of too low an incidence and too random a character to justify this type of rate determination." Respondents' Exhibit 1Z-4.



ferences the members individually face when conducting searches and examinations. ID at 44.

The Commission finds that Respondents' search and examination services are not the "business of insurance." Accordingly, the cooperative rate setting in which they engaged regarding those services is not properly exempt from the application of the antitrust laws. We agree with the ALJ's evaluation that search and examination services essentially are non-insurance services often performed by other entities (such as independent attorneys) outside of an "insurance" context. ID at 85. The industry itself separates out the concept of risk by having separate "risk" rates (not at issue herein). Search and examination services "are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance." ID at 86.

Our only substantive disagreement with the ALJ is with some of his analysis under the *Royal Drug* standard. The ALJ confined his analysis of the second and third *Royal Drug* criteria to a footnote. ID at 88, n.286. He found that there is no evidence that Respondents extended their price-fixing beyond their own agents and employees. He also ruled that these services (and the charges for these services) are part of the relationship between the insurer and the insured in the sense that the search and examination determines what is excluded from the policy and the collective rate-making determines how much the insured pays for the coverage received. ID at 88, n.286. Although our application of the *Royal Drug* criteria to the facts differs from the ALJ's, our conclusion is the same—the antitrust exemption is inapplicable.

The Supreme Court's analyses in *Royal Drug* and *Pireno* each begin with the admonition that antitrust exemptions are to be narrowly construed. As noted pre-

viously, the exemption here is limited to the business of insurance, not the business of insurers. An indispensable characteristic of the business of insurance is the spreading and underwriting of a policyholder's risk. *Royal Drug*, 440 U.S. at 211-212; *Pireno*, 458 U.S. at 127.

The parties expended considerable energy arguing about the relative importance of the three criteria set forth in *Royal Drug*. Our analysis proceeds from the Supreme Court's statement in *Pireno* that "[n]one of these criteria is necessarily determinative in itself, . . . 458 U.S. at 129." Support for the contention that none of the criteria is determinative is found in the fact that the court examined all three criteria in both *Pireno* and *Royal Drug*. An alternative contention stresses the "necessarily" in the Court's language in *Pireno*, suggesting that in a particular case one criterion might be determinative. Under this view, the Court's review of all three factors in both cases may have been undertaken for the purpose of illustrating how the criteria should be interpreted. We find both contentions plausible.

Given this conundrum, we could choose a method of analysis that utilizes a balancing test while examining all three criteria. Such a balancing approach could flow from the statement in *Pireno* that "[w]e may assume the challenged peer review practices need not be denied the § 2(b) exemption solely because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." 458 U.S. at 133 (emphasis in original). This is consistent with the Court's language in the same opinion that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. (Note, again, the use of the word "necessarily" in this last statement—it may mean that in an individual case a single criterion could be determinative.) We need not

engage in any balancing of the *Royal Drug* criteria here, though, since our examination reveals that the activity in question fails to meet all three criteria.

A second, parallel method of analysis would be to treat underwriting and risk spreading as the essence of all three criteria. This is suggested by the Court's statement that underwriting and risk spreading is an "indispensable" element of insurance. Further, when the *Pireno* court examined the second criterion, it focused on the fact that the peer review under scrutiny occurred only after the risk had been transferred—"the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies." 458 U.S. at 130. The Court also noted that the third criterion arose out of the need to protect "intra-industry cooperation" in the underwriting of risks—"[a]rrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern." 458 U.S. at 133. Under this second method of analysis, we conclude that Respondents' search and examination services are not the business of insurance. We now elaborate upon the basis for this conclusion.

As to the first *Royal Drug* criterion, we hold that the practice under scrutiny here does not underwrite or spread risk. Separate risk rates are not at issue. The complaint challenged collectively set rates that have as their foundation the non-insurance service of informing buyers and lenders of the existence of title defects on properties. FF, 102-103. The costs of performing these services (including the fixed costs of the title plants)—and not claims from losses incurred by insuring against risks—largely drive the rates charged. F, 99. Thus, we are not convinced by Respondents' argument that the search and examination defines the risk that is transferred. Rather, Respondents'

search and examination activities, in addition to informing buyers and lenders about the status of the title, also serve to reduce Respondents' expenses by excluding risk (e.g., liens, etc.) from coverage.

Search and examination services, like the Pharmacy Agreements in *Royal Drug*, are indistinguishable "from countless other business arrangements that may be made by insurance companies to keep their costs low." *Royal Drug*, 440 U.S. at 215. As the Supreme Court noted in *Royal Drug*, "there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Royal Drug*, 440 U.S. at 214-15 n.12.

The record shows that this is an industry in which there is little, if any, real discretion during the search and examination process, precisely because the title insurers want to eliminate risk coverage from the contract with the insured. FF, 72, 75-83, ID at 85. Risks in fact are excluded routinely from coverage (with the limited exceptions noted in the record for which an additional "risk" fee is charged). Indeed, the rates charged to the insured are not based on the risk associated with that particular property but rather on the purchase price of the property. F, 100.

Our finding is consistent with the decision by the Ninth Circuit in *TIRBA* which held that the provision of escrow services by title insurance companies does not fall within the business of insurance exemption.<sup>11</sup> The escrow services

<sup>11</sup> The *TIRBA* court noted also that the pre-*Royal Drug* cases cited by *TIRBA* were not helpful to *TIRBA*'s position. See 700 F.2d at 1251, n.1. We agree. Prior to *Royal Drug*, there existed "an expansive interpretation of the 'business of insurance' requirement . . .". *Id.* We thus decline to rely upon those same pre-*Royal Drug* cases now cited by Respondents.



at issue are similar to those under scrutiny here in that "the escrow agent reviews documents demonstrating the removal of encumbrances which would otherwise have to be excluded from insurance coverage." 700 F.2d at 1251. As noted above, the purpose of search and examination is to find defects which then are excepted from coverage. The *TIRBA* court accepted the government's argument that the escrow agent performed "merely ministerial functions" and determined that the escrow process itself "does not spread or underwrite risk." *Id.* The court rejected the argument that "mechanisms that merely reduce costs to the insurers are part of the business of insurance." *Id.*

The second criterion involves the policy relationship between the insurer and the insured and focuses on "the type of policy which could be issued, its reliability, interpretation, and enforcement." *Pireno*, 458 U.S. at 128. We are convinced that the risk spreadings or underwriting concept applies to this criterion. CCAB at 27.<sup>23</sup>

The title examiner's search and examination does not involve the spreading or underwriting or risks. Instead, a search and examination only provides information to the insured and the lender as to the status of title. The insurance company separately determines what must be excluded from the policy that is later issued. FF. 59 and 74. The general rule of title insurers is that all identified liens and encumbrances must be listed on the policy as exceptions to coverage. The title examiner does not decide to provide coverage; the title insurer has already decided, as a matter of company policy, not to assume the risk of loss from existing liens and encumbrances. CCAB at 29.

<sup>23</sup> In accord is *TIRBA*, 700 F.2d at 1252, where, in analyzing the second criterion, the Ninth Circuit rejected *TIRBA*'s argument that the escrow process is essential in determining what risks will be accepted by the title insurer.

We agree with Complaint Counsel that correctly applied to title insurance, the "insurer-insured" relationship only extends to the decision of whether a particular defect should be given coverage, such as whether or not to provide coverage for mechanics liens. CCAB at 29. "The legal examination of title that merely reports, in a given case, whether a mechanics' lien has been filed, is a legal determination that is unrelated to insurance company decisions regarding the coverage of policies." CCAB at 29-30. We thus hold that the search and examination, as properly interpreted, is not a part of the "insurer-insured" relationship.

The third criterion concerns whether the practice is limited to entities within the industry. In *Pireno*, the Court stated that the involvement of outside parties need not result in a denial of the exemption, "[b]ut the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." 458 U.S. at 133. Referring to *Royal Drug*, the *Pireno* court then noted that "§ 2(b) [of McCarran-Ferguson] was intended primarily to protect 'intra-industry cooperation' in the underwriting of risks." *Id.* "Arrangements between insurance companies and parties outside the industry can hardly be said to lie at the center of that legislative concern." *Id.* "More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets." *Id.*

In its examination of the third criterion, the *TIRBA* court granted that the fixing of escrow service prices took place among members of the industry. "Thus, *TIRBA*'s activity would seem at first glance to satisfy the third requirement." *TIRBA*, 700 F.2d at 1252. The "complication," as the *TIRBA* court termed it, was that entities

other than insurance companies perform escrow services, "so that immunizing price-setting by insurance companies who perform escrow services would distort competition by those who are not insurance companies." *Id.* As a consequence, the *TIRBA* court ruled that the escrow service price fixing did not satisfy the third criterion. This result seems compatible with the concern expressed in *Pireno* about avoiding the restraint of competition in noninsurance markets.

Our reasoning is in accordance with that of the Ninth Circuit in *TIRBA*. Both the escrow services at issue in *TIRBA* and the search and examination services at issue here are ministerial and noninsurance in nature. *TIRBA*, 700 F.2d at 1251. Further, both escrow and search and examination services are commonly provided apart from any "insurance" trappings. The escrow services in *TIRBA* could be bought apart from buying title insurance. *Id.* at 1252. In the instant case, attorneys' opinions can be a substitute for title insurance. Thus, immunizing price-setting by insurance companies who perform search and examination services may distort competition in non-insurance markets, e.g., in states where the use of an attorney's opinion is still commonplace. F. 35.

There is an additional reason why Respondents' activities do not meet the third criterion. As we read *Pireno's* discussion of the third criterion, the Supreme Court was concerned with protecting the legitimate "intra-industry cooperation" needs of the insurance industry for the purpose of underwriting risks. 458 U.S. at 133. Yet, the industry itself believes that it is not possible to set up an actuarial standard for risk assumption based on loss experience. F. 114. As the ALJ found, there "is no evidence that title insurance rates are set collectively through rating bureaus as a way of obtaining intra-industry cooperation

in the pooling of risk information." F. 114. See FF. 112-115 generally. It is noteworthy that the search and examination services are provided by both insurance companies and persons that do not participate in the insurance business (such as independent attorneys providing opinions), indicating the lack of need for intra-industry cooperation. While the price-fixing encountered here encompasses charges for tasks performed by the employees and agents of the title insurers, we conclude that those employees and agents are not performing an insurance function at the time.

Respondents assert, however, that one Court of Appeals has expressly rejected the view that only ratemaking arrangements limited to the risk or loss portion of insurer's expenses are exempt, citing the pre-*Pireno* case of *Proctor v. State Farm*, 675 F.2d 308, 323 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 839 (1982):

Risk probability is only one element of the ratemaking formula, however. Insurers must also factor in the magnitude of the loss . . . i.e., the cost of repairing (or replacing) the damaged vehicle. . . . In this case, insurers have allegedly collected and shared data on the cost of repair . . . such activity is closely akin to cooperative ratemaking since it involves a necessary part of the ratemaking process.

The reasoning of this case does not help Respondents.<sup>24</sup> Clearly, a single insurer's ability to predict costs of repair on a car may be improved by examining industry average data, e.g., by surveying 1000 cases to determine what

<sup>24</sup> There is serious question whether *Proctor* has continuing vitality in light of *Pireno*. The *Proctor* court expressly disagreed with the Second Circuit's decision in *Pireno*, 650 F.2d 387, 394-95 (2d Cir. 1981). The Supreme Court, however, affirmed the Second Circuit's decision. *Pireno*, 458 U.S. at 134.



garages charge to repair a fender on a particular car. Obviously, it would be easier to do this by sharing data among insurance companies. This type of actuarial assessment, however, does not take place in the title insurance industry for search and examination rates. Respondents state that the title history of each transaction is unique and consequently "an insurer cannot reliably assess on an actuarial or statistical basis whether the purchaser will be vested with fee simple title or whether any defects or encumbrances exist with respect to the particular property to be insured." RAB at 48. *See also* F. 114. Instead, search and examination rates are set essentially by looking at the costs of bureaucratic operations rather than claims experience. Such costs are individually ascertainable by each insurer. ID at 86-87.<sup>25</sup>

We conclude, then, that the activities under scrutiny are not protected by the "business of insurance" exemption. The activities fail to meet all three of the *Royal Drug* criteria. In addition, "search and examination" services,

<sup>25</sup> Respondents also rely upon *In re Equifax Inc.*, 96 F.T.C. 844 (1980). Complaint Counsel counters that in *Equifax*, "the Commission found exempt the collection of medical information from doctors by a consumer reporting agency for use by insurance companies in deciding whether to accept insurance applications and pay claims. [footnote omitted] In *Pireno*, the district court found exempt the collection of medical information by insurance companies from a peer review committee of chiropractors for the purpose of deciding what would constitute reasonable claim payments. [footnote omitted] The Second Circuit and the Supreme Court, however, held that the activity [in *Pireno*] was not part of the 'business of insurance.' [footnote omitted] The information gathering function in *Equifax* did not even provide as strong an argument for an exemption as was the case in *Pireno* because in *Equifax* the information gathering was done by an independent company, not by the insurer." CCAB 37. We agree with the assessment of Complaint Counsel that *Equifax* is no longer good law in light of *Pireno*. CCAB at 36-40.

performed by non-insurers and insurance companies alike, do not have the indispensable element of risk spreading or underwriting necessary to qualify as the business of insurance.

#### V. THE NOERR-PENNINGTON DEFENSE

Respondents argue that the activities in question are protected from antitrust challenge under the *Noerr-Pennington* doctrine.<sup>26</sup> That doctrine, generally speaking, establishes that concerted private efforts to persuade governmental authorities to take action to restrain competition are not subject to the Sherman Act, absent circumstances where such concerted petitioning constitutes a "sham," or an abuse of process.

The ALJ held that arguing that forbidding the collective fixing of rates by competitors somehow interferes with their right of political advocacy is analogous to saying that contractors should be allowed to conspire to rig bids on government projects, "so long as the results of the conspiracy are wrapped in the trappings of a 'petition' or proposal which may be said to convey policy information to official decisionmakers." ID at 99. The ALJ thus denied use of the defense.

Respondents argue, *inter alia*, that the ALJ's ruling conflicts with *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098 (E.D. Pa.) *aff'd mem.*, 688 F.2d 821 (3d Cir. 1982). "In that case, a jockeys' guild allegedly conspired to restrain trade by petitioning the state racing commission to increase jockey fees. The jockeys allegedly

<sup>26</sup> This doctrine is based upon: *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508 (1971).

agreed among themselves on a proposed schedule of fees, then urged the commission to adopt the schedule." RAB at 74. In *Horsemen's*, the court held that the jockeys' guild's successful attempt to influence a state commission to increase the jockeys' pay was protected by *Noerr* and thus did not violate the antitrust laws, 530 F. Supp. at 1109.

Respondents further argue that they were required to file rates with the state and could not legally charge rates that the state disapproved. Respondents, moreover, disagree with the ALJ's bid rigging analogy. Bid rigging is not "joint petitioning," but "a furtive, fraudulent effort to deprive the state's purchasing agents of the benefits of competition. Bidriggers make no effort to provide relevant information to state policymakers." RAB at 76. "By contrast, respondents sought to influence state policy . . ." RAB at 77. "Unlike bidriggers, respondents engaged in this activity openly and above-board. They responded, in fact, to explicit invitations by the state to petition collectively." RAB at 77.

Respondents also state that the ALJ's reliance on *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), *rev'd*, 471 U.S. 48 (1985), is misplaced. Respondents assert that although the Supreme Court granted *certiorari* in *Southern Motor Carriers* on the *Noerr* issue the Court did not rule on it. The Court of Appeals decision in that case is said to be "illogical." RAB at 78.

Complaint Counsel argues that Respondents' *Noerr* standard would mean in effect that a group of competitors could collectively file and use rates without any active state supervision and yet still be exempt from the antitrust laws. Labeling that argument as "clearly wrong," Complaint Counsel asserts that *Noerr* merely protects collective petitioning to induce lawful government action. It does not

protect agreements to use collectively determined rates that may or may not be adopted by the government. CCAB at 138.<sup>27</sup>

We find the *Noerr* defense inapplicable here. First, we are not being asked to consider the legitimacy of collective attempts to lobby the state to require concerted rate-making.<sup>28</sup> Rather, Respondents merely agreed on what rates should be submitted to the state for consideration, after which they implemented the collectively-set rates. If Respondents had instead agreed on a political advocacy campaign to convince the state to adopt or change a rate-making policy, such activity would be protected.<sup>29</sup> The

<sup>27</sup> Complaint Counsel proposes the following *Noerr* standard. CCAB at 140. *Noerr* should complement the state action doctrine. *Noerr* deals solely with collective proposals to influence and obtain anticompetitive government action. The state action doctrine explains that the state must clearly articulate and actively supervise before the parties to the proposal can implement their proposals. Thus, if a state permits a collective proposal to become effective without active supervision then implementation of the proposal is unlawful. The proposal (and the agreement on price that preceded the proposal) is protected by *Noerr* but the implementation constitutes anticompetitive private action for which the private actors may be held liable. In the instant case, more than petitioning took place. Respondents also proceeded to charge the collectively-set rates. CCAB at 144.

<sup>28</sup> Respondents also cite in passing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985). The court, with sparse language, ruled there was a valid *Noerr* defense where "lobbying efforts" by a public corporation defendant (SAIF) "resulted in lawful action" by the state workers' compensation department. *Id.* at 775. However, the instant case does not involve lobbying—it involves collective rate setting.

<sup>29</sup> Such a distinction is important because in *Noerr*, the Supreme Court distinguished collective lobbying activities from the kinds of combinations "ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements . . . and other similar arrangements." 365 U.S. at 136.



agreements in this case, however, were not coincident to the formulation of positions on the desirability of collective rates.<sup>30</sup> We thus think Respondents mischaracterized the evidence when they stated that they "sought to influence state policy. . . ." RAB at 77.

The Supreme Court's recent pronouncement on *Noerr* in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), is directly relevant here. The Court stated that "*Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." 108 S. Ct. at 1939. The context and nature of the defendant's activity in *Allied* made it "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.*<sup>31</sup> Consequently, *Noerr* protection was not available in that case.

Using the *Allied* analysis, we must evaluate the "context and nature" of Respondents' activity to determine whether it is the type that has "traditionally had its validity determined by the antitrust laws themselves." Respondents'

<sup>30</sup> Cf. *Litton Systems, Inc. v. AT&T Co.*, 1982-83 CCH Trade Cas. ¶ 65,194 (2d Cir. 1983), at 71,777:

AT&T erroneously assumes that a mere incident of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*. . . . The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC. . . .

<sup>31</sup> As we stated in *New England*, slip op. at 23, "[b]ecause of its context (private standard-setting) and nature (packing the annual meeting) the Court concluded that *Allied's* activity, in essence promoting agreements not to manufacture, distribute, or purchase plaintiff's product, *id.* at 1937, was 'the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves,' *id.* at 1939."

collective rate formulation and adoption were equivalent to a horizontal price agreement among competitors. Such an arrangement traditionally has had its validity determined by the antitrust laws. Immunizing Respondents' conduct would lead to the result the Supreme Court in *Indian Head* said should be avoided:

Just as the antitrust laws should not regulate political activities simply because those activities have a commercial impact [citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact. [footnote omitted]

Indeed, the Court in *Allied* employed an example that is telling:

We cannot agree with [*Allied's*] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports.

108 S. Ct. at 1938-39.

Thus, Respondents' collective rate setting efforts can "more aptly be characterized as commercial activity with a political impact," 108 S. Ct. at 1941, than as political activity with a commercial impact. Consequently, we hold that the *Noerr* doctrine does not immunize Respondents' collective ratemaking from the antitrust laws.

*Horsemen's*, a case on which Respondents rely, was decided before *Allied*. It did not include in its reasoning the *Allied* formulation that the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have some political impact.

The factual premise in *Horsemen's*, furthermore, differs from that herein. *Horsemen's* was based on an "information" rationale:

The *Noerr-Pennington* doctrine is applicable here. The members of the [jockey] Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission. Since the law permits them to do this, it follows that they must be permitted to confer and to agree upon the fees they wish to propose. [citation omitted] It is vital to the effective functioning of the Commission that it be informed by the jockeys and other interested parties concerning the effectiveness or inadequacy of the current jockey fee schedule.

\* \* \* In order to accomplish this objective, it is clearly permissible for the Commission to consider data and suggestions submitted by the jockeys themselves who unquestionably are the most fertile source of information concerning the adequacy of their compensation. [footnote omitted]

In other words, the *Horsemen's* court placed reliance on the necessity for private collective action in order to enable the governmental authorities to receive vital information and accomplish the underlying objective of the state regulatory scheme.

As such, *Horsemen's* does not help Respondents' argument. The *Horsemen's* court relied on the needed participation in the decisionmaking process of the regulated parties, who provided data that helped the state carry out its regulatory program. But as noted herein, there is no such "need" for participation by the regulated parties here. The collective setting of search and examination rates has no logical connection with underwriting and risk spread-

ing; there is no evidence that collective ratemaking is undertaken by title insurers for the purpose of sharing their collective risk experience.

To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (i.e., apart from the "risk" rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurers, and *therefore the basic rationale of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present.* (Emphasis supplied)

ID at 86.

We thus conclude that *Horsemen's*, even if it is good law after *Allied*, is inapposite. If anything, Respondents' provision of information can be characterized essentially as a "sham," analogous to the unprotected "sham" petitioning behavior in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 513-16 (1972).<sup>32</sup>

## VI. RULE OF REASON

The ALJ held that the collective ratemaking activities of a rating bureau are not governed by the rule of reason because such agreements are per se illegal. ID at 100. Re-

<sup>32</sup> We note in passing that nothing in our decision would prohibit parties collectively from providing meaningful information to state authorities, such as proposing statistical methodologies by which a state commission could determine whether individual submissions and rate requests by members of the industry were "reasonable."



spondents argue, *inter alia*, however, that the Supreme Court's pronouncements in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), and *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), stand for the proposition that price-fixing should not be treated automatically as a per se violation of the antitrust laws. Respondents also contend that the rate filings in this case cannot be considered per se unlawful because they were filed through state-sanctioned rating bureaus and because such rates must meet certain statutory standards (*e.g.*, reasonableness).

We disagree with Respondents' argument. Using the reasoning we employed in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), we find the challenged agreements are inherently suspect. *Id.* at 604. Respondents have not advanced, and we cannot conceive of, any plausible efficiency justification for their price-fixing activities. Nor can they argue that title insurance would be unavailable but for their price-fixing—the record is clear that in the majority of states such practices are not permitted and title “insurance” still is provided. Accordingly, we hold that Respondents' price fixing violates Section 5 of the FTC Act.

## VII. REMEDY

The ALJ would issue an order limited to the states where there was a law violation and prohibit Respondents perpetually from discussing, proposing, setting or filing any rates for title search and examination services through a rating bureau. We concur with this assessment of the appropriate scope of the order although we have expanded the number of states included in the order.

To the extent an order is appropriate, Respondents argue that the ALJ's order is overly broad in that it would

not permit rate bureau participation even where protected by the state action doctrine.<sup>33</sup> We agree with this point and the attached order incorporates an appropriate reflection of the state action doctrine.

Respondents also contend that the order should not be perpetual, stating that their participation in the rating bureaus was conducted openly and in good faith observance of existing legal standards. RAB at 85-86, RRB at 111. “The current volatility of the law of state action immunity, as well as the possibility of future changes in state regulatory practices, warrants that any decree that purports to spell out a standard of ‘active supervision’ be of limited duration.” RRB at 111-112.

Our proposed order enjoins the respondents from fixing prices for title search and examination services in perpetuity. It is the general policy of the Commission, in order to foster deterrence, that conduct prohibitions be perpetual. Respondents' claim that courts and the Commission have found it necessary to limit the duration of orders “in similar circumstances” (see RAB at 86) is unfounded. For example, respondents cite for this point *In the Matter of Kraftco Corporation*, 89 F.T.C. 46, *rev'd on other grounds*, 565 F.2d 807 (1977). In this case, Kraftco was found to have violated both the Clayton Act and the FTC Act by use of an interlocking directorate. *Kraftco*, 89

<sup>33</sup> Complaint Counsel agrees that any order should contain a state action proviso. However, Complaint Counsel's proposed proviso would limit the defense to those states that provided for active supervision through notice, comment and written decision procedures. CCAB at 157. We reject such an approach as being too rigid an application of the active supervision requirement.

Respondents also opposed Complaint Counsel's suggestions that the order should encompass all forms of price fixing and not be limited in geographic coverage. We need not discuss those arguments in view of the relief ordered.

F.T.C. at 60. While the Commission did limit the duration of the provision of the order specifying a particular means of compliance with the order, the Commission in no way limited the duration of the order's core prohibition against such practice. *Kraftco*, 89 F.T.C. at 69-70.<sup>34</sup>

Respondents also cite *Occidental Petroleum Corp., et al.*, 101 F.T.C. 373 (1983). However, that case involved removal of a perpetual conduct provision under the order modification process after consideration of a petition and opportunity for public comment and after passage of time under the order had demonstrated there was no need for the perpetual provision. The Commission expressly reiterated that perpetual conduct orders remain appropriate. *Occidental*, 101 F.T.C. at 374.

Respondents' assertion that the order should not be of perpetual duration because it responds to actions taken openly and in good faith is unpersuasive. The order against Respondents is narrowly crafted and will not impede their lawful business activities. Further, the perpetual aspect merely forbids conduct—horizontal price-fixing—which is per se unlawful. Respondents' "good faith" assertions remain unproven among contradicting hypotheses. But, in any event, once stripped of the inadequate state action and business of insurance justifications, these activities have been shown to constitute pernicious antitrust violations.

<sup>34</sup> Similarly inapposite is Respondents' citation of *Lenox, Inc. v. Federal Trade Commission*, 417 F.2d 126 (2d Cir. 1969). The three-year term limitations there were imposed upon fencing-in provisions, not core conduct provisions. See *In the Matter of Lenox, Incorporated*, 77 F.T.C. 860, 861 (1970).

#### SEPARATE STATEMENT OF COMMISSIONER CALVANI

I concur in the Commission's decision, with one exception. I would affirm the Administrative Law Judge's findings that New Jersey and Pennsylvania have clearly articulated a policy to displace competition.

In each state, the statutory language suggests that its authorization of collective rate-making for insurance might not extend to services provided by insurance company attorney-agents. Each statute, after describing the scope of regulated fees, provides that those do not include charges paid to an attorney. For each state, the Administrative Law Judge resolved what he perceived as statutory ambiguity by examining the state's practice and intent. Pennsylvania filed an amicus brief explaining that it interprets its own law to make regulated inclusive insurance rates (that is, those that include search and examination) applicable to attorney-agents, and that the legislature merely intended by the proviso to exclude from this regulatory scheme those aspects of an attorney-agent's law practice that are unrelated to title insurance, such as issuing opinions. New Jersey did not submit a brief, but its evidence showed that its practice is similar to Pennsylvania's.

In *Southern Motor Carriers*, the Court said that special deference should be given to a state administrative agency's interpretation of its own regulatory statute. 471 U.S. at 64. The two states' agencies interpret their statutes as requiring filing of fees by all agents who issue commitments and policies, including those who are lawyers. There is no case law authority in either state contradicting the agencies' interpretation of their powers, nor indeed has anyone in either state previously contested them. The statutes are comprehensive regulatory schemes, placing the conduct and fees of all title insurance agents within the



agencies' regulatory jurisdiction regardless of attorney status. The provisos are best read as the Administrative Law Judge read them, rhetorical concessions to the bar to alleviate concerns that the agencies not regulate legal fees unrelated to title insurance transactions.

The Commission should not lightly substitute its own interpretation of state laws in contradiction to the states' own interpretation, with no support but its own reading of the texts. I am sensitive to the danger of allowing agency bootstrapping into *ultra vires* territory, see *FMC v. Seatrain Lines*, 411 U.S. 726, 745 (1973). But the Commission may not always be the proper agent to prevent that. The issue here is whether the respondents have violated the law because the states had not articulated their policy against competition clearly enough. Here, the state agencies have formally appeared on the record to assert that their law does indeed articulate such a policy. The laws are not as ambiguous as the Administrative Law Judge believed, but the states' practice leaves no room for doubt about what they think they mean.

**SEPARATE STATEMENT OF COMMISSIONER AZCUENAGA,  
CONCURRING IN PART AND DISSENTING IN PART,  
IN *TICOR TITLE INSURANCE CO.*, DOCKET NO. 9190**

I agree with the majority that the collective ratemaking for title search and examination services engaged in by the respondents in Arizona, Connecticut, Idaho, Montana, New Jersey, Pennsylvania, and Wisconsin was unlawful price fixing. I agree that title search and examination services are not the "business of insurance," and that the respondents' collective ratemaking activities are not protected under the *Noerr-Pennington* doctrine. I also agree that the respondents' collective ratemaking in Montana, New Jersey, Pennsylvania, and Wisconsin are not protected by the state action doctrine. I disagree, however, with the conclusion of the majority that the respondents' collective ratemaking was not actively supervised in Arizona and Connecticut, and I also disagree with the conclusion of Commissioners Strenio and Calvani that the respondents were not actively supervised in Idaho.

Active supervision is not established merely by the existence of statutory authority to review anticompetitive acts of private parties and disapprove those that fail to accord with state policy. We must also consider whether state officials exercise that authority. *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988). We know from *Patrick* that active supervision requires a review sufficient to ascertain consistency with state policy. I therefore agree with the majority's holding that the active supervision requirement is satisfied only where a state official or agency has engaged in a "substantive review" of the collective rate proposals. Slip op. at 9.<sup>1</sup>

<sup>1</sup> The following abbreviations are used in this statement:

Slip op. — slip opinion of the majority

I.D. — initial decision

The majority's statement that the active supervision requirement is satisfied "only where the state agency has acted affirmatively to review and approve the proposed tariff or rate," *id.*, along with its quotation of the majority's statement in *New England Motor Rate Bureau*, Docket No. 9170 (Aug. 18, 1989), that "[n]o clear inference of conscious state approval . . . can be drawn from a state agency's passive acceptance . . . of rate filings," *id.* (quoting *New England*, slip op. at 15), suggests that the majority would find active supervision only when the agency engages in some visible activity. By suggesting that evidence of affirmative activity is required, the majority apparently excludes as a basis for active supervision the use of so-called "negative option" procedures, pursuant to which a proposed rate is deemed approved if it is not rejected or suspended by the state agency before a certain number of days have passed.<sup>2</sup> As I explained in my separate statement concurring in part and dissenting in part in *New England*, slip op. at 3-5 (Azcuena, concurring in part and dissenting in part), this approach may be too facile and may overlook a genuine review on the merits.

The majority's statement that an affirmative, substantive review "ensures that the state agency has consciously considered the anticompetitive consequences of the ac-

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- I.D.F. — initial decision finding
  - Tr. — transcript of testimony
  - CX — complaint counsel's exhibit
  - RX — respondents' exhibit
  - JXA — joint physical exhibit A.

<sup>2</sup> Negative option procedures (also known as "file and use," "use and file," or "deemer" procedures) were used in Connecticut, Wisconsin, Arizona, and Montana. In Idaho, by contrast, rate filings were not effective until they were approved by the department of insurance. See, e.g., I.D.F. 165.

tivity," slip op. at 14, reveals a fundamental misunderstanding of the gravamen of the state action doctrine. The agency need not consider the anticompetitive consequences of the private acts it is reviewing; it need only examine the consonance of those acts with the state's regulatory policy. Although we may earnestly believe that it is a mistake for a state to choose to displace competition among title insurance firms with a regulatory system that permits those firms to set prices collectively, it is not our place to use the federal antitrust laws to displace that state's decision. The majority's apparent distaste for state-regulated price-fixing, which I share, perhaps carries more weight than it should in the majority's analysis of active supervision.

The decision of the majority with respect to active supervision is particularly difficult, if not impossible, to reconcile with the recent decision of the Commission regarding active supervision in *New England Motor Rate Bureau*, Docket No. 9170 (Aug. 18, 1989). In *New England*, the majority found active supervision in the state of Rhode Island apparently based solely on one post-complaint hearing and the fact that the Rhode Island agency could point to written orders indicating that rates had been approved. *New England*, slip op. at 6-7, 21-22. To the extent that the majority prefers visible activity of review over the testimony of state officials that review in fact occurred, there is far more evidence of such activity in Connecticut, Arizona and Idaho than there was in the *New England* case in Rhode Island.

#### *Connecticut*

The Connecticut rating bureau filed only two general rate proposals, one in 1966 and one in 1981. I.D.F. 130. The majority concludes that Connecticut did not actively



supervise the rating bureau because it did not "meaningfully examine" either of those filings. Slip op. at 12. The majority also concludes that Connecticut did not give sufficient review to a number of ancillary findings. *Id.*

As the ALJ noted, "[w]ith the passage of time, the facts relating to the 1966 filing are elusive." I.D.F. 130. The record does show that the Connecticut insurance department wrote to the rating bureau on April 3, 1966, to request additional information and to schedule a meeting between the insurance commissioner and the president of the rating bureau, RX 104; that the rating bureau wrote its members seeking additional statistical data, RX 105; that the rating bureau told the insurance department that it was "preparing the data requested by you" and expected to submit that data soon after May 24, 1966, RX 105A; that the rating bureau withdrew its original filing in favor of a revised filing, RX 106-07; and that the department approved the revised rate filing several weeks later, RX 110.

The majority agrees with the ALJ's finding that "there is no evidence that the department's request for justification relating to this rate was ever answered satisfactorily." Slip op. at 12, *quoting* I.D.F. 130.<sup>3</sup> Of course, the record con-

<sup>3</sup> At first glance, the situation in Montana may appear similar. But I agree with the majority that there is no evidence of active supervision in Montana, although my reasons are somewhat different. The record contains virtually no information about the Montana insurance department's supervision of the 1983 filing, which was the only general rate filing submitted by the Montana rating bureau in the two and one-half years of its existence. The parties stipulated that the department official who was responsible for reviewing the 1983 filing met with the former director of the rating bureau, Robert L. Stratton, the day he submitted that filing, but that she has no recollection of what was said at that meeting or whether the rating bureau provided any additional financial or statistical data to the department at a later time. CX 343A-D.

According to the majority, Montana requested additional data about that filing, but "[t]here is no evidence that the additional data

tains no evidence that the department's request was *not* answered satisfactorily. Even assuming that the department's request was in fact not answered, this would tell us very little, if anything, about whether the department performed a substantive review of the rate filing.

The letter of April 3, 1966, and the subsequent exchange of correspondence demonstrates at least that personnel in the insurance department were aware of the 1966 filing and that they took some steps that indicate attention on their part relevant to a review of that filing on the merits. The more plausible reading of the evidence is that the de-

requested by the state was ever provided." Slip op. at 23 (*citing* I.D.F. 177). It is not clear that Montana did seek any additional data about the 1983 filing; the state insurance department sent a letter to the rating bureau seeking additional information concerning a supplemental filing submitted in 1984, RX 227, but I am unable to find on the record any such letter concerning the 1983 filing. Although the 1984 letter appears to anticipate a review on the merits, there exists no other evidence suggesting that such a review in fact occurred in Montana at any time. In Connecticut, Arizona, and Idaho, by contrast, there is credible evidence that state officials reviewed some rate filings on the merits; in the absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times.

In his separate additional statement, Commissioner Strenio characterizes my approach as a "some review" active supervision standard, under which "evidence that state officials occasionally exercised their authority" is enough to demonstrate that active supervision has taken place. My colleague apparently misunderstands the basis for my conclusion that Connecticut, Arizona, and Idaho actively supervised respondents' collective rate filings. In those three states, there is general evidence that state officials reviewed rate filings for consistency with state policy, and particular evidence that certain filings were reviewed. In the absence of evidence that no review of other filings was conducted, I believe it is more reasonable to infer that review of those filings did take place. In Wisconsin, by contrast, where there is evidence that no review of certain filings took place, I conclude that the respondents were not actively supervised. *See supra* note 6.

partment's approval of the 1966 collective rate filing was predicated on a review of the filing on the merits.<sup>4</sup> My confidence in this reading is strengthened by the clear evidence of active supervision of the 1981 collective rate filing.

The director of the Connecticut insurance department's Property and Casualty Rating Division, Waldo R. DiSanto, testified that he and another employee of the department, Mr. Walter S. Bell, reviewed the 1981 filing. Tr. at 2744. Mr. DiSanto concluded that the rate filing, which he described as "well-supported and detailed," met the statutory requirements, so it was approved. *Id.* at 2744-45. Mr. Bell testified that he read the filing itself as well as an Arthur D. Little Company report justifying the proposed rates from cover to cover, and that he compared the proposed rates to previous filings. Tr. at 2827-28. The majority nevertheless concludes that the department did not actively supervise the 1981 rate filing because it lacked the statutory authority to control the allegedly excessive commissions paid by respondents to their attorney-agents.<sup>5</sup>

<sup>4</sup> The majority's approach disregards the usual presumption that official actions by public officers have been regularly performed. C. McCormick, *Law of Evidence* § 343, at 807 (2d ed. 1972).

<sup>5</sup> Mr. DiSanto testified that he thought commission expenses were "very high," but that his agency had statutory authority only to verify the validity and accuracy of an insurer's claimed expenses. *Id.* at 2738, 2740. Mr. DiSanto also testified that

[T]he reason that commission costs are high is that the title insurance companies do not control or make a market.

The market is controlled and made by attorneys. They control the business because people purchasing homes need an attorney and go to him for these functions.

The attorney has the ability in most instances . . . to deal with any title insurance company he wants. . . .

Tr. at 2799. Finally, Mr. DiSanto testified that he had no suspicion that the attorney-agents had agreed to fix the commissions they would

According to the majority, Connecticut's failure to "meaningfully regulate a critical component of the ratemaking process" demonstrates that it did not actively supervise the 1981 collective rate.<sup>6</sup> Slip op. at 12.

The Connecticut statute states that insurance rates may not be excessive. *Conn. Gen. Stat.* § 38-201c(a) (JXA at 141). If the insurance commissioner finds that a rate is excessive or otherwise unlawful, he may prohibit the use of the rate. *Id.* at § 38-201p(d). The statute does not provide for the direct review of expenses and does not authorize the commissioner to prohibit excessive expenses. If the commissioner concludes that an insurer's proposed rate is excessive because its expenses are excessive, his remedy is to disapprove the rate, not to regulate the expense. Implicit in Mr. DiSanto's conclusion that the 1981 filing satisfied the requirements of the statute is the conclusion that those proposed rates were not excessive. His testimony

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charge respondents or had pressured the respondents improperly in order to secure higher commissions. *Id.* at 2804.

<sup>6</sup> The majority finds a similar problem in Wisconsin. Although I agree that Wisconsin did not actively supervise the respondents, I do not base my conclusion, as the majority does, on Wisconsin's failure to scrutinize the reasonableness of each "critical component" of the respondents' expenses. Norman J. Wirtz, a rate analyst in the Wisconsin insurance commissioner's office, testified that "we did not review" the rates filed by the rating bureau for new policy endorsements because it was assumed that competition among the rating bureau members would drive those rates down. Tr. at 1768-69, 1802-08. Even if Mr. Wirtz's assumption were correct—and he admitted that he did not know whether competition had driven the endorsement rates down—the competitive price would be fortuitous, not a result of active supervision. The state action doctrine allows a state to displace competition with regulation. Wisconsin intended to displace competition by authorizing regulated ratemaking, but the state officials who were given the authority to regulate simply decided not to exercise that authority.



that commission expenses were "very high" is not necessarily inconsistent with such a conclusion.

The Connecticut statute also provides that the insurance department shall consider, among other things, "past and prospective expenses both country-wide and those specially applicable to this state." *Id.* at § 38-201c(b). The Connecticut insurance department certainly considered the issue of commission expenses. Mr. DiSanto testified that his discussions of the 1981 filing with the members of the rating bureau "center around" commission expenses. Tr. at 2737.

The evidence indicates that the Connecticut insurance department did all that was required of it by the statute. The majority does not question that the Connecticut statute meets the "clear articulation" part of the state action doctrine. It is not justifiable to insist that the insurance department do more than the statute authorizes it to do in order to satisfy the active supervision requirement. The majority may believe that attorney-agents of title insurance companies are paid excessive commissions, but the issue here is active supervision, not whether commissions are too high.

The majority's holding that the 1981 filing was not actively supervised because Connecticut did not "meaningfully regulate a critical component" of the proposed rates has other troubling implications. Commissions to attorney-agents are a significant expense for title insurers, but by no means their only significant expense that the agency might need to consider. The majority's opinion in effect may require a degree of government involvement in the business decisions of regulated firms that begins to look like co-management rather than external supervision in the form of judgments that proposed rates are or are not excessive or otherwise inconsistent with state policy. One other point deserves mention. Assume that the commissions

paid to attorney-agents in Connecticut are excessive — perhaps because those attorney-agents colluded, or due to some market failure. It would be punishing the victims for the Connecticut insurance department to disapprove proposed rates or to take some other action against title insurers.

The Connecticut insurance department has the authority to disapprove excessive rates, but it concluded after its review of the 1981 filing that the proposed rates were not excessive. The Commission has no reason to doubt that active supervision took place.

The majority also holds that what the ALJ characterized as Connecticut's "minimal review" of some of the "ancillary" endorsements and amendments filed between 1966 and 1983 was insufficient. Slip op. at 12. The record shows, however, that Connecticut gave appropriate review to all these filings. As the ALJ noted, some of the ancillary filings were "carefully reviewed." I.D. at 51 n.192. In fact, at least three filings were either disapproved or withdrawn and revised by the rate bureau after state insurance officials questioned certain features of those filings. Tr. at 2759-69. The ALJ's characterization of the review of some other filings as "minimal" seems to be based on Mr. DiSanto's statement that insurance department officials gave greater scrutiny to filings that had greater significance to consumers, and less scrutiny to filings of less importance. *Id.* at 2772. But Mr. DiSanto also testified that the Connecticut insurance department "reviews every filing that we receive." *Id.* at 2758. Mr. DiSanto's unrefuted testimony that all the filings were reviewed, along with the evidence that some filings were formally or informally disapproved, is sufficient to support a finding that all the ancillary filings were reviewed.

### Arizona

The majority concludes that Arizona did not actively supervise respondents' collective ratemaking between 1968 and 1981 because the state insurance department "conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years." According to the majority, "[n]o active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it." Slip op. at 17.

Although the majority's reasoning on this point has some appeal, I am not persuaded that an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates. The Arizona statute that requires examinations of rating bureaus does not specify what is to be examined or why. *Ariz. Rev. Stat. Ann.* § 20-370. Nothing on the face of that statute suggests that the required examination is necessary or even related to the state insurance department's review of rates for conformance with state policy.<sup>7</sup>

I presume that the examination requirement was intended seriously by the legislature, and I do not dismiss as insignificant the department's failure to perform examina-

<sup>7</sup> Of course, nothing on the face of the statute prevents the insurance department from using the required examination as a vehicle for the review of proposed rates. In 1980, the director of the insurance department announced his intention to perform an examination, one purpose of which was to assist the department in the performance of its responsibility to regulate rates. Even if we assume that the examinations that should have been performed before 1980 also would have focused, in part or in whole, on the reasonableness of proposed rates, it is clear that the department had the ability to review those rates through other means. The evidence discussed below, including the testimony of Mr. Barberich, indicates that rates were reviewed even though no examinations were performed until 1980.

tions. But the focus of the active supervision part of the state action doctrine is whether the state agency conducted a review sufficient to ascertain that the private acts conform with state policy. Looking to the agency's performance of ancillary functions, however important those functions may be, may actually detract from what should be our primary concern: that is, whether the agency looked at the proposed rates and concluded that they were consistent with state policy.

The majority also concludes that Arizona did not actively supervise certain "minor rate amendments, adjustments, and endorsements" filed between 1968 and 1981 because "there is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." Slip op. at 17 (quoting I.D. 61, n.233).

Emil L. Barberich, who was the chief deputy director of the Arizona insurance department between 1973 and 1982, testified that every rate filing submitted during those years was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would be sometimes situations where more information was needed and once that was obtained and it met the requirements, it would be approved.

Tr. at 2230. He also testified that the department would have acted promptly if it had believed that any title insurance company was earning excessive profits. *Id.* at 2262.

The majority points to nothing that would call into question the truthfulness or accuracy of this testimony, but concludes nonetheless that the respondents have failed to establish that Arizona actively supervised their col-



lective filings. Mr. Barberich's unchallenged testimony that his department did scrutinize all such filings is credible evidence that it did actively supervise collective rate filings between 1973 and 1982.

The record contains very little information about how the department operated before Mr. Barberich went to work there in 1973, which is unfortunate. It appears that no examination of the rating bureau was performed between 1968 and 1973, but that does not distinguish the earlier period from the tenure of Mr. Barberich. One could infer from this sparse record that the department probably failed to review rate filings.<sup>8</sup> It seems more reasonable, however, to draw inferences from the record evidence about the department's review of rate filings between 1973 and 1982. Government agencies, like all institutions, change as time passes. But it would be surprising if (and we have no reason to think that) the Arizona insurance department's policies, procedures, and personnel changed completely when Mr. Barberich arrived in 1973. Delores Williamson, who succeeded Mr. Barberich, testified that the department's current rate review procedures were similar to those that existed during his tenure. *See, e.g., Tr. at 2190-92.* In the absence of evidence to the contrary, the more likely inference is that the department followed similar procedures before Mr. Barberich was ap-

<sup>8</sup> The record does contain a letter written by a rating bureau official on October 23, 1969, which says that the department accepted the rating bureau's 1968 general rate filing "without any question and without requirement of any justification thereof." RX-60A. This letter tells us only that the author was not asked to provide justification or otherwise questioned about that filing — it does not purport to describe what did or did not occur inside the state agency. The department's failure to seek additional information, like a failure to hold a hearing on a proposed rate, does not demonstrate that no review occurred.

pointed to his position.<sup>9</sup> Having concluded that the department did actively supervise rate filings submitted after 1973, I conclude that it is more probable than not that the department also reviewed filings submitted before 1973.

In his separate additional statement, Commissioner Strenio also concludes that Arizona could not have actively supervised the respondents' collective rate filings because the personnel in its insurance department were not "qualified" to evaluate the reasonableness of those rates. I do not question my colleague's statement, based on his experience as a member of the Interstate Commerce Commission, that "reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts." But I believe the Commission should decline to accept his invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel. Federal oversight of the qualifications of state regulatory personnel is hard to distinguish from federal oversight of state regulatory decisionmaking. For example, a decision that actuaries are qualified to be insurance rate reviewers but that accountants (or lawyers or economists or MBA's) are not is essentially a decision that only a particular mode of analysis is acceptable.

#### *Idaho*

The Idaho insurance department audited the title insurance rating bureau three times between 1974, when the

<sup>9</sup> The majority's holding in Arizona suggests that it would never find that active supervision occurred in a particular time period unless the state employee who reviewed the rates filed during that period so testified. If that is their intention, perhaps it would be well to state it straight out.

rating bureau was organized, and 1984, when it was dissolved. I.D.F. 164, 171. The department also suspended the rating bureau's first major rate filing until after it held a public hearing and amended a regulation relating to a variety of title insurance matters. I.D.F. 168. The rating bureau's only other general rate filing was approved only after the department subpoenaed additional expense data from the rating bureau members and hired a consultant to examine the filing. I.D.F. 169. Despite this evidence, Commissioners Strenio and Calvani conclude that Idaho did not actively supervise a number of miscellaneous rate adjustments, forms, and endorsements filed by the rating bureau because there was "apparently little or no review" of these filings. Slip op. at 20 (quoting I.D. at 68 n.259).

That conclusion seems to be based on nothing more than the inability of Robert A. Fraundorf, the insurance department official who was responsible for the review of those miscellaneous filings, to remember much about the details of those reviews. Given that title insurance filings constituted a relatively small number of the filings that this official was also responsible for reviewing — he also reviewed filings for property and casualty insurance, disability insurance, and several other lines of insurance — and that several years had passed since the filings in question had been submitted, it is not altogether surprising that the official's recall of specifics was less than impressive. On cross-examination, Mr. Fraundorf did testify that he never permitted a title insurance filing to go into effect without reviewing it, and that he "definitely" would have asked questions about each rate filing he reviewed until he was satisfied that the rate was proper. Tr. at 3446-48.

Idaho clearly engaged in active supervision of some of the respondents' collective filings. Mr. Fraundorf's unrefuted testimony that he reviewed all the filings submitted to the department is credible and, along with the other

evidence of review by the Idaho insurance department, is sufficient to support a finding of active supervision of all the filings in question.

#### Conclusion

The majority's reading of the evidence and application of the state action doctrine loads the dice heavily against the respondents. The majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies. The failure to carry out any statutory requirement, whether that requirement has anything to do with a review of proposed rates for consistency with state policy or not, is taken as proof that active supervision of rates did not take place. On the other hand, the failure to take action to limit commissions paid to attorneys demonstrates a lack of supervision even where such action is not authorized by the agency's enabling statute; the agency must review each and every "critical component" of a proposed rate even if the state legislature intended only that it review the reasonableness of the rate itself. This comes perilously close to a "heads we win, tails you lose" standard.

As in *New England Motor Rate Bureau*, the majority appears to approach state action as a doctrine to be narrowly construed as an exemption to the federal policy favoring competition. The state action doctrine involves principles of preemption of state or local law by federal law. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60-70 (1982) (Rehnquist, J., dissenting); accord, *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 264-65 (1986). It is not our role to question the correctness of a



state agency's decision that proposed rates are reasonable or unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiter of state policy, a result that the principle of federalism underlying the state action doctrine precludes.

The complaint allegations of violations in Connecticut and Arizona should be dismissed.

**ADDITIONAL STATEMENT OF  
COMMISSIONER ANDREW J. STRENIO, JR.**

*TICOR TITLE INSURANCE CO.*, Docket No. 9190

The majority and Commissioner Azcuenaga ("minority") hold contrasting views on how to apply the active supervision requirement of the state action doctrine. The majority insists upon taking a good look at whether state officials actually have exercised their regulatory authority.<sup>1</sup> The minority, however, as I read the eloquent statement by Commissioner Azcuenaga, would be satisfied by a casual glance. In my judgment, this minority position is shortsighted, apart and aside from the potential harm consumers would be exposed to from price fixing should a quick glimpse approach prevail. As I see it, the position espoused in the minority statement is inconsistent with the principles of a number of state action cases including *Patrick v. Burget*, 108 S. Ct. 1658 (1988), impractical, and inclined to pay far more deference to the presumption of the regular performance of public duties than warranted here.

To begin with, the minority approach apparently would consider the active supervision requirement of substantive review to be fulfilled if there is evidence that state officials occasionally exercised their authority. For example, the minority statement asserts that "[i]n Connecticut, Arizona, and Idaho, there is credible evidence that state officials reviewed some rate filings on the merits; in the

<sup>1</sup> The insistence by the majority is consistent with the unanimous Commission decision to appear on the brief before the Supreme Court alongside the Department of Justice in *Patrick v. Burget*. The brief, filed jointly, emphasized regarding the active supervision issue that "[m]erely finding some state involvement or monitoring does not suffice." [citations omitted] Brief for the United States As Amicus Curiae Supporting Petitioner at 8, *Patrick v. Burget*, No. 86-1145.

absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times." Minority statement at 4, n.3. But this logic flies in the face of *Patrick*, where the Court held not only that there must be a "program of supervision," but also that "[t]he mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. Nowhere does the Court suggest that "some review" is adequate to provide active supervision.<sup>2</sup>

Indeed, the discussion in *Patrick* belies any notion that "some review" by supervisory agencies or courts will do. The Court said that "the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature." 108 S. Ct. at 1665. "This kind of review would fail to satisfy the state action doctrine's requirement of active supervision." *Id.* "Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine." *Id.* Similarly, haphazard evidence of some review of some rate filings can not by alchemy transform the lead of general inattention into the gold of active supervision.

<sup>2</sup> In accord with *Patrick*'s holding that "the mere presence of some state involvement or monitoring does not suffice" is 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 345, n.7 (1987). The *Patrick* Court characterized *Duffy* as deciding that "certain forms of state scrutiny . . . did not constitute active supervision because they did not 'exer[t] any significant control over' the terms of the restraint." 108 S. Ct. at 1663. A "some review" standard also would run counter to the Court's admonition in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Contrary to a "some review" line of analysis, these Supreme Court cases stand for the proposition that even a little bit of unsupervised price fixing is impermissible.

The impractical nature of the minority position on active supervision stems from the difficulty of securing firm footing on such a slippery slope. After all, a "some review" standard would beg a series of difficult questions as to just when and where partial review will be tolerated. For instance, would there be active supervision when regulatory officials exercise their authority fifty-one percent of the time? On Tuesdays and Thursdays? When staff is inadequately trained or otherwise incapable of monitoring all types of the private conduct involved?

Another difficult question arises from the minority's dismissal of the evidence that the Arizona Department of Insurance for many years did not carry out a statutorily-required, regular examination of the state rating bureau.<sup>3</sup> The minority expresses skepticism that "an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates." Minority statement at 8. Yet the minority does not explain which of these failures to comply with statutory duties are to be excused and evidence overcame any presumption of the regular performance of official duties. In contrast, the minority at times seems inclined to go to inordinate lengths in constructing chains of reasoning in support of the presumed existence of official regularity. For example, the minority expresses confidence that active supervision took place in Connecticut in 1966 because of evidence assertedly showing active supervision in 1981. Minority statement at 5. But, such a leap of faith can not surmount the chasm of fifteen years. Too much can change by way of policy and personnel to justify a retroactive finding of active supervision covering the entire period.

<sup>3</sup> Note that as recently as the *Duffy* case, the Supreme Court found active supervision was lacking in a state because it "does not monitor market conditions or engage in any 'pointed reexamination' of the program." 479 U.S. at 345.



Caution also is warranted lest excessive reliance be placed upon the presumption of official regularity. *Patrick* and *Duffy* make clear that the mere creation of a state regulatory mechanism hardly establishes the presence of active supervision. In the realm of state action law, it is advisable to keep in mind the abuses that could flow from credulity toward all claims of active supervision. As the Supreme Court said in *Patrick*, “[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.” 108 S. Ct. at 1663. That is one reason the Court “sought to ensure that private parties could claim state action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation” by establishing a “rigorous two-pronged test . . .”. 108 S. Ct. at 1662.

Turning now to some of the individual state findings, although a detailed restatement of the majority’s assessment is unnecessary, a few comments are worth making in support of the majority’s conclusion that active supervision was lacking in Connecticut and Arizona. I do not discuss Idaho below, since an equally-divided Commission found no liability as to that state.

#### *Connecticut*

The minority statement makes much of the exchange of correspondence requesting or promising to supply information about the 1966 filing, but brushes aside the fact that no further evidence tending to show the existence of active supervision has been introduced.<sup>5</sup> According to the

<sup>5</sup> The minority statement also asserts that ancillary rate filings were adequately supervised. However, although some ancillary rate filings were disapproved, overall the review process was inadequate. Mr. DiSanto testified that the department never examined insurance com-

minority, the “more plausible reading of the evidence is that the department’s approval of the collective rate filing was predicated on a review of the filing on the merits.” Minority statement at 4. This observation does not carry the day. In the first place, respondents had the burden of showing active supervision and did not do so here. The Supreme Court in *Patrick* reaffirmed its long-held tenet that respondents have the burden of demonstrating the actual exercise of regulatory authority. See Slip Op. at 9-10. See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978).

Further, I think the most plausible reading of the evidence is quite different from the conclusion reached by the minority. It seems to me that a rational agency regularly performing its official duties would retain in its files the most important documentation that exists while discarding the trivia. Here, there is no record whatever of substantiating data – or of any work that was performed upon such hypothetical data. Yet, the relatively unimportant correspondence between the parties has been preserved carefully. To me, this suggests strongly that the agency kept on file everything of the slightest consequence and that substantiating data is missing simply because it never was supplied to the state.

The minority proceeds to infer from the record that the state agency “concluded after its review of the 1981 filing that the proposed rates were not excessive.” Minority statement at 7. However, that inference is not readily reconciled with much of the record evidence. The Connecticut statute says that insurance rates may not be

pany expenses for reasonableness. DiSanto Testimony at 2793. DiSanto testified further that expense information supplied by the title insurers in their annual statements was not even broken out by state. *Id.* at 2795. Without such data, the insurance department lacked the ability to conduct a meaningful review.

excessive,<sup>6</sup> and also authorizes the state insurance department to prohibit the use of excessive rates by title insurers.<sup>7</sup> Here, though, there is testimony from the Chief of the Connecticut Insurance Department's Property and Casualty Division, Mr. DiSanto, that he approved the rates despite a "disproportionate allowance for commissions." DiSanto Testimony at 2737.<sup>8</sup> Mr. DiSanto testified further that in his view the agent's commission component of title insurer expenses was "very high,"<sup>9</sup> that this was the main problem area in title insurance,<sup>10</sup> and that this was driving up the cost of title insurance.<sup>11</sup> In light of this evidence, it is more reasonable to infer that either the state agency should have disapproved the rates as excessive, or that the Connecticut regulatory system failed to confer to the state agency adequate power in practice to block the imposition of excessive rates. See Slip Op. at 12.

Regarding the latter inference, recall the Supreme Court's admonition that "a gauzy cloak of state involvement" can not thwart the national policy in favor of competition. Indeed, a state legislature may clearly articulate and affirmatively express an intent to displace competition (thus meeting the first prong of the state action test), but fall short of the mark set by the second prong if an inadequate system of regulation subsequently is established.

<sup>6</sup> Conn. Gen. Stat. § 38-201c(a).

<sup>7</sup> *Id.* at § 38-201p(d).

<sup>8</sup> See also DiSanto Testimony at 2756; "Again, one of the things discussed was the impact of commissions and a discussion of alternative means that could effectively address the disproportionate expense loading for commissions."

<sup>9</sup> DiSanto Testimony at 2737. DiSanto estimated that agents' commissions "are about 60 percent" of the title insurance premium. DiSanto Testimony at 2797.

<sup>10</sup> DiSanto Testimony at 2797.

<sup>11</sup> DiSanto Testimony at 2738.

After all, in *Duffy* the Supreme Court found clear articulation but not active supervision since, *inter alia*, the state "d[id] not monitor market conditions or engage in any 'pointed reexamination' of the program."<sup>12</sup> *Duffy*, 479 U.S. at 345. Nor did the state "control month-to-month variations in posted prices."<sup>13</sup> *Id.* In ringing and relevant words, the Court held that active supervision was lacking because the state "has displaced competition among liquor retailers without substituting an adequate system of regulation." *Id.*

#### Arizona

I have discussed above the extended time during which the state insurance department did not conduct the statutorily-required examination of the state rating bureau, and Director Low's conclusion that such an examination was "of critical importance in permitting the Department to carry out its state regulatory responsibility over title insurers . . .".<sup>14</sup> In addition, Mr. Wilkie's testimony merits consideration in connection with the majority's finding about ancillary filings.

<sup>12</sup> This, of course, was exactly the situation in Arizona during the time no examination of the state rating bureau was conducted despite the statutory mandate.

<sup>13</sup> In other words, the state must exert significant control over all aspects of price fixing by private parties. The majority found, accordingly, that this principle was violated by inactivity such as that displayed by those state insurance agencies that did not examine amendments to the general rate schedules.

The majority opinion notes that the use of scientifically-sound sampling techniques to examine a rate filing might be defensible. Slip Op. at 12. This is because sound sampling techniques may provide an accurate survey of a filing as a whole. The majority opinion goes on to stress the simple point that state agencies may not engage in "hit-or-miss" review by ignoring some filings (or some category of filings) in their entirety. *Id.*

<sup>14</sup> See footnote 4, *supra*.



Mr. Wilkie had worked in the Arizona title insurance industry since 1946, and had held a senior position with Lawyers Title of Arizona since about 1957. Wilkie Testimony at 2056. His testimony overall conveys an intimate knowledge of the industry and the operations of the rating bureau. Yet Wilkie, as noted by the ALJ in his Initial Decision at 61, n.233, had no recollection of any communication between the rating bureau and the state agency regarding the numerous amendments that were filed. Given other testimony pointing in a different direction, I agree with the ALJ that the record is inconclusive on this point. However, it bears repeating that respondent has the burden of showing active supervision.

The minority statement does not address other instances of non-supervision cited in the majority opinion. Slip Op. at 18. The minority argues that a likely inference to make about pre-1973 procedures is that they were the same as followed under Mr. Barberich, who was Chief Deputy Director of the Arizona Department of Insurance from 1973 to 1982. Minority statement at 9. However, Mr. Barberich testified that the insurance department hired an outside firm to conduct an examination of the data submitted in 1983 by Tillinghast, Nelson & Warren, Inc. (filed in response to Arizona's tardy efforts to examine the title insurance industry), because "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277. Barberich said that during the period 1973 to 1982 he "tried to find someone that could give us a rate review. Going back to 1974 and '75, I remember we paid somebody \$1,000 to just give us an idea what it was all about. The report we got didn't tell us anything." Barberich Testimony at 2281. Barberich also testified that the insurance "department did not do anything with respect to that basic rate between 1973 and 1982 . . .". Barberich Testimony at 2289.

This testimony lends further support for two propositions. The first proposition is that the rates in use in Arizona were not actively supervised during the time in question. The insurance department was confronted with complex submissions and yet had no personnel who "had a good handle" on the title insurance industry and the rate justifications that were submitted.<sup>15</sup> As noted previously, the rates were in effect for a number of years before any serious attempt was made to evaluate them.<sup>16</sup> The second proposition is that — where highly complex matters are involved, such as reviewing rates for reasonableness — one must be wary about automatically following presumptions to the effect that substantive reviews are being conducted.<sup>17</sup> Arizona here could not actively supervise the industry for an extended period because it had no qualified personnel.<sup>18</sup> In the context of something as in-

<sup>15</sup> Commissioner Azcuenaga suggests that this conclusion is derived from my "review of the resumes of state regulatory personnel." Minority statement at 10. To the contrary, this conclusion is derived from Mr. Barberich's assessment that "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277.

<sup>16</sup> See also Slip Op. at 18.

<sup>17</sup> As a former commissioner at the Interstate Commerce Commission, I know from experience that reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts. Director Low of the Arizona Department of Insurance apparently would agree. In commenting on the proposed study of the Arizona title insurance industry, his recommendation of a specific firm for the examination was made on the basis of "the extremely technical nature of this examination, including the obvious need for substantial actuarial and economic expertise in this area . . .". RX 93A.

<sup>18</sup> The absence of sufficiently trained personnel seems substantively equivalent to not having an "adequate system of regulation." Cf. *Duffy*, 479 U.S. at 345.

tricate and challenging as the active supervision of rate filings, it thus is necessary for reviewing courts and agencies to sift through the available evidence rather than sit back and presume that all is in order.

#### *Conclusion*

The minority concludes that the majority's standard "loads the dice heavily against the respondents" by emphasizing "various perceived deficiencies" in the review process. Minority statement at 11. Yet, as shown here and in the majority opinion, the deficiencies were real and substantial. The case law is clear that state regulatory agencies may not pick and choose when they will exercise their authority; merely providing some state involvement or monitoring can not substitute for active supervision. Further, the non-performance here of statutory duties was directly related to the relevant state policy. *See e.g.*, the discussion of Arizona's non-examination of the title insurance industry. The majority view, accordingly, follows from the Supreme Court's establishment of a "rigorous two-pronged test" (*Patrick v. Burget*, 108 S. Ct. at 1662) requiring that a state "exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 1663.

#### APPENDIX D

### UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

Docket No. 9190

IN THE MATTER OF TICOR TITLE INSURANCE COMPANY, A  
CORPORATION, CHICAGO TITLE INSURANCE COMPANY, A  
CORPORATION, SAFECO TITLE INSURANCE COMPANY, A  
CORPORATION, LAWYERS TITLE INSURANCE CORPORATION,  
A CORPORATION, AND STEWART TITLE GUARANTY  
COMPANY, A CORPORATION

#### INITIAL DECISION

By MORTON NEEDELMAN, Administrative Law Judge

#### I

#### STATEMENT OF THE CASE

The complaint in this proceeding was issued on January 7, 1985. It charges that in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, respondent insurers,<sup>1</sup> operating through rating bureaus, have restrained competition in setting rates for title search and examination services and settlement services. The gravamen of the complaint appears in Paragraph 11 —

<sup>1</sup> The complaint cites six title insurers as respondents. On June 24, 1986, the Secretary withdrew this matter from adjudication with respect to First American Title Insurance Company in order for the Commission to consider a settlement agreement under § 3.25(c) of the Commission's rules.



Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

Respondents' answers, which were filed on February 11 and February 13, 1985, admit that from time to time they have been members of rating bureaus in several states, but challenge the Commission's subject matter jurisdiction on the grounds that rating bureau activity relating to title search and examination and settlement constitute part of the business of insurance and is therefore exempt from the Federal Trade Commission Act by reason of the McCarran-Ferguson Act. Respondents' answers also assert that the alleged anticompetitive practices are immune from the federal antitrust laws by reason of the "state action" doctrine. Additional defenses include mootness based upon withdrawal from the rating bureaus, and the claim that respondents' collective rate making activities come within the *Noerr-Pennington* doctrine.

It became apparent at the outset of this proceeding that the complaint allegation respecting settlement or escrow services was an ancillary issue. At most it only pertains to rating bureau activity in five states—Arizona, Ohio, Connecticut, Pennsylvania, and New Jersey—and since respondents' escrow practices in Arizona are already the subject of injunctive relief as a result of the final order in *United States v. Title Insurance Rating Bureau of Ariz., Inc.*, 517 F. Supp. 1053 (D. Ariz.), *aff'd*, 700 F.2d 1247

(9th Cir.), *cert. denied*, 104 S. Ct. 3509 (1984), both sides directed their efforts almost exclusively to the search and examination issue. The escrow or settlement question, to the extent that it is still an issue in this case, is treated separately for the most part in the Findings of Fact and Discussion herein.

In the prehearing stage, the parties were allowed discovery including advanced notice of proposed exhibits and the prospective testimony of witnesses. Complaint counsel's case-in-chief was heard during the week of February 18, 1986. The defense case was presented between April 21 and July 28, 1986. Rebuttal evidence was offered by complaint counsel on July 29. The record was closed for receipt of evidence on August 29, 1986. During the hearings, counsel for all parties were given full opportunity to be heard and to cross-examine the witnesses. Both sides filed their main briefs and proposed findings on September 22, 1986; replies were filed on October 14, 1986.

After reviewing all of the evidence, as well as proposed findings and briefs submitted by the parties, and based on the entire record, including a determination of the credibility of witnesses (which took into account demeanor and the consistency between testimony prepared for litigation and the plain meaning of everyday business records), I make the following findings of fact:<sup>2</sup>

<sup>2</sup> Proposed findings not adopted in the form or substance proposed are rejected as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX (Complaint counsel's exhibits)  
RX (Respondents' exhibits)

Joint Physical Exhibit A (JXA, 311 pages) is a compilation of relevant state title insurance statutes. Section 33-25-302 of the Montana Title

Insurance Act (cited at p. 184, Vol. I of respondents' main brief) does not appear in JXA but the entire text is quoted in note 269, *infra*. Testimony is cited by the name of the witness followed by the transcript page as in DiSanto 2738-41. CX 1 and RX 1 are the indices required by § 3.46(b) of the Commission's Rules.

Respondents requested *in camera* treatment for certain exhibits, and after an adequate justification was made pursuant to § 3.45 of the Rules, it was ordered that these exhibits were to be segregated and placed in an *in camera* file. The *Omnibus In Camera Order* issued on February 10, 1986, which governs all *in camera* exhibits, provides as follows:

It should be clearly understood that nothing contained in this Order in any way limits the public use of this material in decisions written by the Administrative Law Judge, the Commission, or reviewing courts. While I have no intention of making unnecessary disclosures, whether or not to publish in my Initial Decision all or part of the material contained in *in camera* exhibits must be left solely to the discretion of Administrative Law Judge, and I must reserve the right to exercise this discretion without consulting any party or third party.

The *Omnibus In Camera Order* also provides that documents shall be removed from the *in camera* file three years after the date on which the record was closed—that is, on August 29, 1989.

The appearances of the witnesses were as follows:

Name	Called By	Transcript Pages
Lawrence F. Anito, Jr. (Independent Attorney and Attorney-Agent for Respondents Ticor and First	Complaint Counsel ("c.c.")	248-348 American)
Irwin E. Cooper (Independent Attorney and Attorney-Agent for a non-respondent title insurer)	c.c.	357-430
Albert F. Quadraccia (Agent for a non-respondent title insurer)	c.c.	486-530
Robert A. Fraundorf (Bureau Chief, Licensing, Idaho Department of Insurance)	c.c.	3425-3453

Name	Called By	Transcript Pages
Gerald L. Ippel (President, Respondent Ticor)	Respondents ("resp.")	608-706
Albert D. Malaker (Great Lakes Regional Counsel, Respondent Chicago Title)	resp.	707-836
Mark W. Sinkhorn (Ohio State Counsel, Respondent Lawyers Title)	resp.	843-934
Michael J. Fromhold (Senior Associate Title Counsel, Respondent Ticor)	resp.	941-1034
Michael F. Waiwood (Agent for Respondent Ticor)	resp.	1040-1128
Perry J. Armstrong (Agent for Respondent Ticor)	resp.	1134-1182
Thomas F. Ferraro (Vice President, Respondent Chicago Title)	resp.	1185-1245, 2298-2368
Joseph C. Bonita (Vice President, Respondent Ticor)	resp.	1251-1309
Erich E. Everbach (General Counsel, Respondent Ticor)	resp.	1311-1418
Robert B. Holtom (Independent Insurance Consultant and Expert)	resp.	1429-1601
Leonard C. Donohoe (General Counsel, Respondent Chicago Title)	resp.	1610-1685
Donald E. Grabski (Vice President, Respondent Lawyers Title)	resp.	1686-1732
Norman J. Wirtz (Insurance Rate and Forms Analyst, Property and Casualty Section, Wisconsin Office of Commissioner of Insurance)	resp.	1738-1827



<u>Name</u>	<u>Called By</u>	<u>Transcript Pages</u>
Joseph M. Clayton (Deputy Manager, New Jersey Land Title Rating Bureau)	resp.	1828-1879
Neil A. Bethel (A Principal Owner, Tillinghast, Nel- son & Warren, an insurance actuari- al consulting firm)	resp.	1885-2037
John B. Wilkie (President, Respondent Lawyers Title (Arizona))	resp.	2055-2144
Deloris Williamson (Chief Deputy Director, Property and Casualty Section, Arizona Department of Insurance)	resp.	2167-2216
Emil L. Barberich (Market Conduct Examiner, Arizona Department of Insurance)	resp.	2222-2297
Irving H. Plotkin (Title Insurance Rate Expert, Arthur D. Little)	resp.	2376-2566 2573-2718
Waldo R. DiSanto (Director, Property and Casualty Division, Connecticut Insurance De- partment)	resp.	2724-2823
Walter S. Bell (Examiner, Property and Casualty Division Connecticut Insurance De- partment)	resp.	2824-2847
Robert L. Statton (Vice President, Respondent SAFECO)	resp.	2853-2874
Robert C. Mitchell (Vice President, Respondent SAFECO (Idaho))	resp.	2875-2952
Norman T. Smith (Executive Director, Ohio Title Insur- ance Rating Bureau)	resp.	2958-3046

## II

## FINDINGS OF FACT

## A. IDENTITY OF RESPONDENTS

1. Respondent insurers are engaged in the business of insuring the ownership of real estate for buyers and those lenders (mortgagees) who rely on real estate as security for their loans. As part of the package of services they offer, respondents provide search and examination and settlement or escrow services.<sup>3</sup>

2. Respondent Ticor Title Insurance Company ("Ticor") is a corporation organized under California law, with its principal place of business located at 6300 Wilshire Boulevard, Los Angeles, California 90048.<sup>4</sup> Ticor, which conducts its title insurance business in 49 states and the District of Columbia, maintains approximately 300 branch offices and has over 5,000 employees.<sup>5</sup> For the

<u>Name</u>	<u>Called By</u>	<u>Transcript Pages</u>
Peg Ising (Assistant Chief, Property-Casualty Division, Ohio Department of Insur- ance)	resp.	3047-3068
Robert L. Ratchford (Former Director, Ohio Department of Insurance)	resp.	3069-3102
Robert T. Haines (Former General Underwriting Coun- sel, Respondent Chicago Title)	resp.	3107-3243
Marvin C. Bowling, Jr. (Executive Vice President (Law), Re- spondent Lawyers Title)	resp.	3265-3420

<sup>3</sup> CX 156z-2, z-4, CX 247F-G, CX 250H-"T", CX 293D.

<sup>4</sup> Complaint and Ticor's Answer, ¶ 2. Prior to 1982, Ticor was known as Pioneer National Title Insurance Company. CX 164A.

<sup>5</sup> CX 165B.

year ending December 31, 1983, Ticor reported income of \$219,869,518 from title insurance premiums and \$62,488,172 from other sources.<sup>6</sup>

3. Respondent Chicago Title Insurance Company ("Chicago Title") is a corporation organized under Missouri law, with its principal place of business located at 111 W. Washington Street, Chicago, Illinois 60602.<sup>7</sup> Chicago Title, which conducts its title insurance business in 49 states and the District of Columbia, maintains approximately 150 branch offices.<sup>8</sup> For the year ending December 31, 1983, Chicago Title reported income of \$205,525,412 from title insurance premiums and \$51,713,074 from other sources.<sup>9</sup>

4. Respondent SAFECO Title Insurance Company ("SAFECO") is a corporation organized under California law, with its principal place of business located at 13640 Roscoe Boulevard, Los Angeles, California 91409.<sup>10</sup> SAFECO, which conducts its title insurance business in 46 states and the District of Columbia, maintains branch and agency offices throughout the United States.<sup>11</sup> For the year ending December 31, 1983, SAFECO reported income of \$163,088,978 from title insurance premiums and \$29,713,045 from other sources.<sup>12</sup>

5. Respondent Lawyers Title Insurance Corporation ("Lawyers Title") is a corporation organized under Virginia Law, with its principal place of business located at 6630 West Broad Street, Richmond, Virginia 23230.<sup>13</sup>

<sup>6</sup> CX148z-52, CX258.

<sup>7</sup> Complaint and Chicago Title's Answer, ¶ 3.

<sup>8</sup> CX167B.

<sup>9</sup> CX149z-28.

<sup>10</sup> Complaint and SAFECO's Answer, ¶ 4.

<sup>11</sup> CX169.

<sup>12</sup> CX150z-22.

<sup>13</sup> Complaint and Lawyers Title's Answer, ¶ 6.

Lawyers Title conducts its title insurance business through approximately 2500 branch and agency offices located in 49 states and the District of Columbia.<sup>14</sup> For the year ending December 31, 1983, Lawyers Title reported income of \$98,302,394 from title insurance premiums and \$16,395,472 from other sources.<sup>15</sup>

6. Respondent Stewart Title Guaranty Company ("Stewart") is a corporation organized under Texas law, with its executive offices located at Stewart Building, Galveston, Texas 77550.<sup>16</sup> Stewart conducts its title insurance business in 45 states and the District of Columbia through regional, district, and state offices.<sup>17</sup> For the year ending December 31, 1983, Stewart Title reported income of \$97,443,521 from title insurance premiums and \$3,382,457 from other sources.<sup>18</sup>

7. In 1982, respondents Ticor, Chicago Title, SAFECO, Lawyers Title, and Stewart, collectively accounted for 57 percent of the \$1.35 billion title insurance industry. Ticor with 16.5 percent of the market, Chicago Title with 12.8 percent, Lawyers Title with 12 percent, and SAFECO with 10.3 percent, are the four largest title insurers. First American Title Insurance Company, a named respondent which has a consent settlement agreement pending before the Commission, is the fifth largest title insurer with 9.7 percent of the market. Stewart, which accounts for 5.4 percent of the market, is the eighth largest title insurer.<sup>19</sup>

<sup>14</sup> CX173.

<sup>15</sup> CX152z-84.

<sup>16</sup> Complaint and Stewart's Answer, ¶ 7.

<sup>17</sup> CX174B.

<sup>18</sup> CX153z-22.

<sup>19</sup> Market shares are measured in terms of gross operating revenues. CX166z-3. See also CX293E. While Stewart's national market share is relatively small, it is the leading title insurer in Texas and it is strongly positioned in the West and Southwest. CX293G.



## B. COMMERCE

8. Respondent insurers write policies and provide search and examination and settlement services in all states except Iowa, which has a statutory prohibition against issuing title insurance.<sup>20</sup>

9. The search and examination of title and the issuance of title insurance policies are integral parts of interstate real estate transactions in which loans either cross state lines or are guaranteed by agencies of the United States located in Washington, D.C. Typically, these lenders or loan guarantors require that the title to the real estate securing the loan be searched and examined, and that a title insurance policy be issued.<sup>21</sup>

10. Similarly, the settlement services provided by respondents are part and parcel of interstate real estate transactions.<sup>22</sup>

11. Respondents offer their search and examination and settlement services through nationwide networks of regional, divisional, and branch offices, which are subject to and benefit from the financial support, control, direction, policies, and national advertising and marketing campaigns of respondents' home offices.<sup>23</sup>

<sup>20</sup> CX171.

<sup>21</sup> Haines 3231, Bowling 3316; CX 171, CX 182D, CX 196Z-136 to Z-137, CX 237T-W, CX 247C, CX 253Z-31 to Z-32, CX 303A; RX 431M.

<sup>22</sup> CX 155D, CX 196Z-60 to Z-74, CX 238F-G; RX 394Z-58 to Z-74, RX 409L, RX 427Z-135, RX 431Z-116 to Z-118.

<sup>23</sup> CX 247B; RX 413G, "T", RX 442F, RX 444J, L; see also Fromhold 955-56, Bonita 1253.

## C. TITLE, THE ABSTRACT OF TITLE, THE ATTORNEY'S OPINION, TITLE INSURANCE

### *Real Estate Title*

12. Title is a legal concept covering the bundle of rights possessed by the owner of real property. These rights, which are recognized and protected at law, include possession, use, control, enjoyment, and the power to transfer the property.<sup>24</sup>

13. In real estate transactions in which title is to be transferred, buyers are interested in determining whether there are any title defects in the form of liens, encumbrances, easements, covenants, restrictions, or claims that might interfere with the quiet enjoyment of possession. This translates into the buyer's need to know if a seller's title is limited or affected by such pre-existing rights or interests of others as the right of a utility company to maintain a right-of-way across the property, or the marital rights of a prior spouse of the seller, or the ability of an adjoining landowner to invoke a restrictive covenant, or the existence of enforceable mortgages, use restrictions, tax judgments, mechanic's liens, and other liabilities, limitations, charges, or liens.<sup>25</sup>

14. Similarly, the interest of a mortgagee involved in a real estate transaction centers around his need to know of the existence of any clouds on title that may adversely affect the priority of his own lien.<sup>26</sup>

15. Historically, there have emerged several ways of assuring buyers and lenders of the existence of good title (see Findings 16-39).<sup>27</sup>

<sup>24</sup> CX 155"T", CX 253Z-3; RX 409Z-32.

<sup>25</sup> CX 87X-Y, CX 253Z-3; RX 431M. By custom, the cost of a title evidence is borne by the buyer. RX 436C.

<sup>26</sup> CX 156Z-62 to Z-63, CX 237T-W.

<sup>27</sup> See also CX 253Z-3 to Z-4, Z-9; RX 409Z-32.

### The Abstract Of Title

16. The earliest evidence of good title (which persists to the present day) was provided by title searchers (sometimes called "abstractors") who originally were in the business of researching public records and providing purchasers or lenders with a summary (called the "abstract of title") of all the documents forming a chain of title.<sup>28</sup>

17. The purpose of the abstract of title was to arrange in chronological order all pertinent information respecting title that appeared on the public record, the assumption being that the buyer or lender would then either cure the revealed defects or decide not to go forward with the purchase or loan.<sup>29</sup>

18. If in making a purchase or loan decision, the buyer or lender relied on what turned out to be an incomplete or inaccurate abstract, the abstractor was only liable for negligent failure to exercise the level of vocational skill expected of title searchers in the locality where the search was conducted. In the absence of proof of negligence, the abstractor was not liable for mistakes, errors, or omissions in the search.<sup>30</sup>

19. The negligence liability of the abstractor only attached to errors and omissions in searching public records. The abstractor had no liability for failure to uncover unrecorded defects in title.<sup>31</sup>

20. Over the years, the abstracting business developed several refinements. First, abstractors began to issue "certificates of title," which certified that title vested as shown

<sup>28</sup> Bowling 3335; CX 87Z-114 to Z-119, CX 154C-E, CX 155C, CX 156V, Z-29, Z-234, CX 249D, CX 253Z-4 to Z-5, CX 261F-G, CX 310B-C; RX 409C, RX 427Z-132, RX 433.

<sup>29</sup> CX 189F, CX 253Z-4 to Z-5.

<sup>30</sup> CX 91Z-36, CX 246E, CX 253Z-5 to Z-6.

<sup>31</sup> CX 253Z-6, CX 261F-G.

in the documents searched; still later, abstractors actually guaranteed title and set aside cash reserves to assure their capability for paying losses.<sup>32</sup>

21. Presently, the abstract of title is rarely sold to a buyer or lender who relies on it in lieu of the other, more widely used evidences of good title such as an attorney's opinion or title insurance.<sup>33</sup>

22. Typically, the modern commercial abstract company performs its searches and examinations as an agent for an insurance company,<sup>34</sup> or it may be retained by an independent attorney, attorney-agent, or insurance company personnel who then examine the abstract before issuing an attorney's opinion or a title insurance policy.<sup>35</sup>

### Attorney's Opinions

23. Since the abstract of title did not include an evaluation of the legal significance of the recorded documents, there eventually evolved a practice, which continues to this day, of submitting either original title records or abstracts to a qualified independent real estate attorney (sometimes called a "conveyancer") who makes a critical review of the records and then renders for buyers or lenders an attorney's opinion or a certification of title.<sup>36</sup>

<sup>32</sup> CX 154C-E, CX 155D, CX 253Z-5; RX 391D-E.

<sup>33</sup> Everbach 1414; CX 261F-G.

<sup>34</sup> Bowling 3336; CX 172F; RX 488H.

<sup>35</sup> Anito 293-95, Cooper 365-67, 370-72, Ippel 699, 702, Fromhold 954-55, Everbach 1341, Donohoe 1665, Bowling 3379; CX 87M, CX 91Z-35, CX 145A, CX 175B, CX 237Z-2, CX 245B, CX 261F-G. Because the work of the abstractor is directly affected by local real estate laws and customs, the present-day commercial abstract company is usually a small, locally-owned business. CX 261R-S.

<sup>36</sup> Everbach 1314; CX 154D, CX 156Y to Z-1, CX 175B, CX 182E-F, CX 189Z-15 to Z-16, CX 196Z-136, CX 253Z-5 to Z-6, CX 262E-F; RX 391E. If the attorney conducts the search himself, he issues a certification of title. CX 156Y to Z-1.



24. These independent real estate attorneys are also retained by title insurers or their agents for the purpose of providing an attorney's opinion prior to the issuance of a title insurance policy.<sup>37</sup>

25. Like the abstract, the main purpose of the attorney's opinion is to give the buyer or lender a full accounting of any title defects so that an informed decision can be made as to whether to attempt to cure the revealed defects or to just drop the deal. The attorney's opinion merely adds to the abstract an interpretation of the legal significance of documents uncovered in the search.<sup>38</sup>

26. The attorney's opinion, like the simple abstract, carries with it limited liability for errors or omissions, amounting essentially to malpractice liability grounded on negligence or failure to meet the accepted standard of professional legal competence in the locality where the attorney's opinion was given.<sup>39</sup> If the attorney conducted the search himself, he is liable for negligence in both the search and examination. In those instances, however, in which the attorney's opinion is based on an abstract prepared by an abstractor, his liability is limited to due care in the preparation of an opinion based on the information reviewed.<sup>40</sup>

27. Also, as is the case of the abstract, an attorney rendering an attorney's opinion is not liable for either hidden defects not discoverable by a diligent record search or for inaccuracies in the public records.<sup>41</sup>

<sup>37</sup> CX 172F; RX 488H.

<sup>38</sup> Cooper 368-69; CX 189Z-15 to Z-16; RX 489E-F.

<sup>39</sup> Anito 281; CX 182D, CX 196Z-136, CX 237P-R, CX 253Z-5; RX 489D.

<sup>40</sup> Ippel 659, Everbach 1325-26; CX 196Z-136, CX 253Z-5, CX 261F-G.

<sup>41</sup> Anito 281; CX 182E-F, CX 246E, CX 253Z-6 to Z-7.

28. The liability of the attorney for his opinion is also limited by his solvency, and ends with the death of the attorney or the tolling of a statute of limitations.<sup>42</sup>

29. A variation of the attorney's opinion is the so-called "bar fund"; in effect, a title insurance company organized by independent attorneys who then issue policies based upon their own searches and examinations.<sup>43</sup> Bar funds, which offer an additional layer of protection beyond the attorney's opinion or the simple abstract by covering losses from hidden defects, were organized as the bar's answer to loss of search and examination business to title insurance companies.<sup>44</sup>

#### Title Insurance

30. The origin of title insurance as a form of evidence of good title traces to a 1863 Pennsylvania case, *Watson v. Muirhead*, 57 Pa. 161 (1868), which held that an attorney rendering an attorney's opinion was liable only for negligence. The negligence standard of *Watson* imposed a significant barrier to recovery for errors or omissions made by abstractors or attorneys in conducting a title search and examination.<sup>45</sup>

31. Title insurance (technically, an agreement to indemnify an owner or mortgagee for loss or damage sustained by reason of a defect in title not explicitly excluded

<sup>42</sup> CX 196Z-136, CX 237P-R, CX 246E, CX 253Z-6 to Z-7; RX 489D.

<sup>43</sup> Ferraro 2319-23; CX 196Z-153 to Z-155. In Connecticut, however, the bar fund is not regulated by the state insurance department. Ferraro 2319-23.

<sup>44</sup> Ferraro 2319-23. As it happens, title insurers themselves, like respondent Lawyers Title, have been formed by lawyers who specialized in real estate work. RX 456F.

<sup>45</sup> Everbach 1326-28; CX 237P, CX 310B-D; RX 391D-H, RX 417Z-32.

or excepted from the policy) was designed to go beyond either the abstract or the attorney's opinion by imposing on insurance companies liability for errors in the conduct of the search and examination irrespective of any negligence in carrying out the process.<sup>46</sup>

32. Title insurance covers errors or mistakes made by those who perform the search and examination on behalf of the insurer whether or not they are agents, independent contractors, or employees (see Findings 40-57).<sup>47</sup>

33. Title insurance in its present form also exceeds the protection given by abstracts or attorneys' opinions in that it survives even if the person who conducted the search and examination dies.<sup>48</sup>

34. Unlike the abstract or an attorney's opinion, title insurance includes the obligation to defend in the event that an insured is sued.<sup>49</sup>

35. Like the abstract and the attorney's opinion, however, title insurance policies are basically assurances to the buyer or lender that defects in title discoverable from examining the public record have been brought to the attention of the buyer or lender so that they can cure the defect or decide not to go ahead with the deal.<sup>50</sup>

36. A secondary purpose of title insurance, developed over the years and going beyond the scope of the abstract or attorney's opinion, is to protect the buyer or lender from hidden or so-called "off-record" risks not discoverable from examination of public records such as

<sup>46</sup> CX 155"T", CX 196Z-136, CX 319B; RX 417Z-31, RX 491A.

<sup>47</sup> See also Bowling 3363; CX 182E.

<sup>48</sup> CX 196Z-136, CX 237P.

<sup>49</sup> CX 182E, CX 253Z-9; RX 417Z-31.

<sup>50</sup> See Findings 58-59.

forgery, missing heirs, previous marriage, impersonation, or confusion in names.<sup>51</sup>

37. Title insurance is largely a post-World War II phenomenon whose growth reflects the need for a standardized form of assurance of good title to complement standardized mortgages that are resold in a nationwide secondary mortgage market.<sup>52</sup>

38. While title insurance is now the predominant form of title evidence, the attorney's opinion is still commonplace especially in the New England and Southeastern states.<sup>53</sup> As indicated in Findings 21-22, the abstract of title is now rarely used alone as an evidence of good title, and instead usually serves as the basis for issuing either an attorney's opinion or the report that precedes the issuance of a title insurance policy.<sup>54</sup>

39. Viewed from a market perspective, the search and examination of title is a service business acquired by respondents and other title insurers as a result of their aggressive merchandising of title insurance (at the expense of

<sup>51</sup> CX 82V-W, CX 87Y to Z-1, Z-25 to Z-26, CX 154E-F, CX 182E-F, CX 237P, CX 261"T"-K; RX 391F-H. There are several major areas (which may be viewed as off-record risks) that are excepted from the standard coverage, such as easements and liens not shown on the public record (see Finding 87 and CX 250H).

<sup>52</sup> Ippel 699-700; CX 91Z-37 to Z-38, CX 182D, F, CX 189Z-17, CX 196Z-136 to Z-137.

<sup>53</sup> Ippel 699, Everbach 1411-17, Bowling 3367; CX 154D, CX 189F, CX 261F-G, RX 391E, RX 436C.

<sup>54</sup> Ippel 701-02, Fromhold 954-55, 1005; CX 87M, CX 156Z-2, CX 175B, CX 237Z-2; see also Finding 81.



abstracts and attorneys' opinions) as a superior way of evidencing good title.<sup>55</sup>

**D. Attorney-Agents, Approved Attorneys, and Employees of Title Insurers**

40. As indicated in Findings 22 and 24, a title insurance policy may be based on a search and examination conducted by an independent abstractor or an unaffiliated independent attorney. Most title insurance policies, however, are issued after the search and examination has been made by either attorney-agents, approved attorneys (a variation of the independent attorney), or employees of respondent insurers (see Findings 41-57).

41. It is a common practice in the title insurance industry for searches and examinations to be conducted by attorneys who have been designated as agents of title insurers.<sup>56</sup> These attorney-agents often are recruited from the ranks of independent attorneys (see Findings 23-28) who formerly rendered attorneys' opinions or issued certificates of title.<sup>57</sup>

42. Agents for title insurers have also been drawn from the body of independent commercial abstractors who own title plants,<sup>58</sup> and who may continue to offer

<sup>55</sup> Ippel 699-700, Ferraro 1219, 1239-41, Donohoe 1664-65, 1667-68, Bowling 3293; CX 87W to Z-8, CX 154A-H, CX 156Z-2, CX 182D-F, CX 189Z-16, CX 196Z-150 to Z-151, CX 236E, CX 237P-W, CX 246A-L, CX 249D, CX 253Z-3 to Z-11, CX 261H, CX 262E-G, CX 292D-E, CX 311A-J, CX 312B, CX 313B, CX 319A-B; RX 312, RX 391D-H, RX 394Z-31, RX 475-RX 475E, RX 476A, RX 484A, RX 489D-E.

<sup>56</sup> Ippel 698; CX 182G-H; RX 444N, RX 491A-B.

<sup>57</sup> Ferraro 1241; CX 182G-H.

<sup>58</sup> Armstrong 1135, Everbach 1341, Bowling 3376; CX 228A.

abstracting services apart from their work as agents for title insurers.<sup>59</sup>

43. Agents, whether they are attorneys or abstractors, are liable (like the independent attorney rendering an attorney's opinion) to the title insurer for negligence in conducting the search and examination.<sup>60</sup>

44. The relationship between agents (especially attorney-agents) and title insurers is fraught with opportunities for directing the placement of title insurance business. While ostensibly acting as independent legal counsel to a usually uninformed buyer, the attorney-agent is in a position to channel the consumer's title insurance business to the agent's insurer-principal in exchange for commissions, commonly referred to in the title insurance business as "agent's retention" since the agent collects and transmits the premium less his "retention" to the insurer. The agent's retention, however, includes not only the actual cost of conducting the search and examination, but may also reflect his ability to negotiate for a large part of the total insurance premium (as much as 90 percent) on the basis of his strategic position in the real estate transaction.<sup>61</sup> In point of fact, the growth of a title insurer

<sup>59</sup> Ippel 698, Armstrong 1135.

<sup>60</sup> Cooper 388; CX 145C, CX 146D; RX 410J. The willingness of respondent insurers to test agent liability is tempered by the strategic importance of agents in garnering insurance business. Bowling 3300-02, 3311; RX 487N-Q; see also Finding 44.

<sup>61</sup> Anito 279, Sinkhorn 917-18, Armstrong 1165, Ferraro 1241-42, Plotkin 2681-84, 2705-12, DiSanto 2737-40, 2799-2808, Bowling 3301; CX 30Z-85, CX 145E, CX 156Z-7, CX 182G-H, CX 232G, CX 247X-Y, CX 257A, CX 278W-X, CX 301B, CX 306B, CX 307B, CX 323J, CX 324L, CX 333Z-11 to Z-15, CX 334C-D; RX 3E, RX 23K-L, RX 32, RX 114, RX 502Z-55.

is largely tied to its ability to solicit and retain attorney-agents who can influence the placement of business.<sup>62</sup>

45. "Approved attorneys" are independent attorneys who have been formally designated by respondent insurers as qualified to conduct a search and examination prior to the issuance of a title insurance policy.<sup>63</sup>

46. An approved attorney, who often will graduate to the attorney-agent status described in Findings 41-44,<sup>64</sup> may also continue to function as an unaffiliated independent attorney, and in that capacity conduct searches and examinations and issue opinions and certificates for individual buyers or sellers or even other insurance companies which have not designated him as an approved attorney.<sup>65</sup> Moreover, an attorney may function as an approved attorney for one insurer and an attorney-agent for another.<sup>66</sup>

47. An approved attorney is neither an employee nor an agent of the title insurer which designated him as an approved attorney.<sup>67</sup>

<sup>62</sup> Ferraro 2356-57, Plotkin 2698-99, Bowling 3301; CX 166R, CX 237Z-3, CX 293E.

<sup>63</sup> CX 160G-H; RX 410L-M, RX 491A.

<sup>64</sup> CX 182G-H. Approved attorneys (usually lawyers with a real estate practice) are often selected on the basis of their ability to influence the placement of title insurance business. Bowling 3367. From the approved attorney's standpoint, the relationship is desirable because not only may they graduate to the status of an attorney-agent (and the prospect of large "retentions") but as an approved attorney he can expect to receive substantial fees from conducting searches, examinations, and settlements (DiSanto 2806, Bowling 3368; CX 30Z-85; RX 410L) as well as whatever other advantages accrue from being identified with a national title insurance company in professional directories. Sinkhorn 878.

<sup>65</sup> Cooper 364-70.

<sup>66</sup> Cooper 370.

<sup>67</sup> RX 491A.

48. The approved attorney may perform the search himself or base his examination upon the abstract of an independent abstractor.<sup>68</sup>

49. The approved attorney's analysis, which is indistinguishable from the attorney's opinion or certification of the ordinary independent attorney (see Findings 23-25), is relied upon by the insurer or the agent of the insurer in issuing initially a binder or commitment, and eventually a title insurance policy (see Finding 80).<sup>69</sup>

50. The approved attorney, however, unlike the attorney-agent prepares neither the preliminary binder leading up to the issuance of the title policy nor the title policy itself.<sup>70</sup>

51. The approved attorney, like any other independent attorney rendering an attorney's opinion for an insurer or an insurer's attorney-agent, is liable to the insurer for failure to exercise due diligence and reasonable professional skill in the search and examination of public records.<sup>71</sup>

52. If the approved attorney's examination of title is not based on his own search but rather upon a commercial abstract, liability is limited to the exercise of reasonable care and due professional skill in rendering an opinion in light of the information contained in the abstract.<sup>72</sup>

53. The approved attorney receives no financial remuneration from the title insurer. The approved at-

<sup>68</sup> CX 160G-H.

<sup>69</sup> Sinkhorn 928-29, Fromhold 953, 1021, Clayton 1838, Bowling 3371-72; CX 155D, CX 160G-H, CX 182G, CX 237Z-9 to Z-10; RX 3E.

<sup>70</sup> CX 132F, CX 160G, CX 182G, CX 196Z-11 to Z-12; RX 410L, X to Z-1, RX 491A.

<sup>71</sup> CX 160G, CX 237Z-9 to Z-10, CX 257A.

<sup>72</sup> CX 160G-H.



torney bills his client—the buyer or the lender—for the cost of conducting the search and examination.<sup>73</sup>

54. Respondent insurers do not set, either jointly or separately, the fee that the approved attorney charges his client. The approved attorney sets his own fees.<sup>74</sup>

55. In addition to approved attorneys and attorney-agents, searches and examinations are conducted by employees of respondent insurers stationed in respondents' branch offices.<sup>75</sup>

56. The mix of attorney-agents, approved attorneys, and direct employees not only varies according to custom and geography, but also reflects how successful a particular title insurer has been in enlisting the support of well-established attorneys who can influence the placement of their client's insurance business.<sup>76</sup>

57. Essentially all title insurers operate in the same way, and while there may be differences among respondent insurers as to how business is allocated among employees, agents, and approved attorneys, the practices and policies described in these findings are fairly attributable to all respondents.<sup>77</sup>

<sup>73</sup> CX 30Z-85, CX 160G, CX 182G; RX 3E.

<sup>74</sup> Fromhold 1020-22, Bowling 3363-64; CX 30Z-85.

<sup>75</sup> CX 87M, CX 175C, CX 237Z-2; RX 488H.

<sup>76</sup> Ippel 624; CX 237Z-3 to Z-4, CX 262"T"; RX 491A; see also Finding 44. The mix may also reflect the intensity of the competitive struggle between attorneys and insurance companies for the search and examination and settlement business. In some areas, respondent insurers may have been compelled to use their own employees because of organized bar opposition to having independent lawyers work as insurance company agents or approved attorneys. See CX 196Z-150 to Z-15L.

<sup>77</sup> See Bowling 3374-75.

#### E. THE SEARCH AND EXAMINATION PROCESS FOR ABSTRACTS OF TITLE, ATTORNEYS' OPINIONS, AND TITLE INSURANCE

58. Irrespective of the form in which the buyer or lender are assured of good title (i.e., through abstracts, attorneys' opinion, or title insurance) and irrespective of the hat worn by the searcher and examiner (abstractor, independent attorney, attorney-agent, approved attorney, or insurer's employee) the condition of the title is determined by the same search and examination process.<sup>78</sup> The process is the same because in all cases the objective is the same—to uncover significant impediments to ownership.<sup>79</sup>

59. Neither the use by respondents and their agents of insurance jargon to describe the purpose of their searches and examinations—in their view to determine what risks they are willing to insure<sup>80</sup>—nor the existence of state statutory requirements conditioning the issuance of a title insurance policy upon the conduct of a search,<sup>81</sup> materially changes the nature of the search and examination conducted prior to the issuance of an insurance policy as compared to the process used before an abstract or an

<sup>78</sup> Anito 280-81, Cooper 370-72, 383, Fromhold 1003-04, Haines 3234-35; CX 155D, CX 172F, CX 182G, CX 237Z-9 to Z-10, CX 244"O"-R, CX 245B, CX 247"T", CX 249D, CX 250G, CX 310"T", RX 290A, RX 488H. While the searches and examinations conducted by an independent attorney, approved attorney, and attorney-agent are identical and indeed the same person may wear all three hats, the record indicates that the standard abstract is more detailed than the typical product of the independent attorney, approved attorney, or attorney-agent (see Findings 16-17, 81).

<sup>79</sup> Everbach 1395-96; CX 87M, Z-10 to Z-11, CX 175B-C, CX 182E-F, CX 247F-G, CX 253Z-3 to Z-4, CX 261J-K, CX 262C-D, CX 301B, CX 302B, CX 308B; RX 394Z-47.

<sup>80</sup> Ippel 627, Malaker 745-47, Fromhold 1033, Waiwood 1079, Everbach 1329, Bowling 3337.

<sup>81</sup> See, e.g., JXA, p. 111.

attorney's opinion are rendered. In all instances, the objective of the searchers and examiners is to provide a statement of the status or condition of title, and to call the attention of the buyer or lender to defects discoverable from the public records so that these clouds on title are corrected before the purchase is made, or if the risks are too great, to call the deal off.<sup>82</sup> In the words of respondent Ticor:

Basically, title insurance is the company's opinion of the ownership and marketability of title to a particular parcel of real property. This can only be ascertained after a thorough and complete search of all the records affecting title to the parcel insured. This search is much more extensive and requires more time than any other investigation conducted in connection with the issuance of other forms of insurance.

A title company is required, not only by law, but in order to make quick and accurate searches, to keep complete records covering all the lands in a particular county. A title company is a service organization and performs a service for those interested in buying, selling and loaning money on real estate. One may make his own search because all of the records necessary to complete such a search are available at the Court House, the City Hall and the Federal Court House. How this search is made and the accuracy of such a search will depend upon an individual's skill, knowledge and perseverance. It could take days, weeks or months, and after completion, the verdict would be inconclusive because with the passage of time, additional filings have been made which have to

<sup>82</sup> Anito 265-67, Cooper 421, Quadraccia 490, Sinkhorn 887-89, Fromhold 970, 1033, Waiwood 1103, Haines 3224-25, 3240-43, Bowling 3335; CX 87H-J, N, Z-10 to Z-11, CX 91Z-35, CX 175C, CX 194, CX 236B, CX 246G, CX 247D-G, CX 249D, CX 252S, CX 253Z-9 to Z-10, CX 261"T"-K, CX 262C-D, CX 293D, CX 294D-E, CX 297, CX 298B, CX 299B, CX 311"T", CX 318B, CX 320Z-157 to Z159; RX 3D, RX 396C, RX 413D, RX 417Z-34, RX 431M-N, RX 488"T".

be considered and construed. This task would be akin to trying to dig away a hill of sand which slides continuously. Through a system of records, kept on each individual parcel, the title company is able to complete this search on a definite date with certainty. When you purchase a title insurance policy, you are buying the services of experts. The company is willing to back the opinion of these experts with the additional feature of insurance. Hence, the use of the word insurance, when naming the product of title insurance.<sup>83</sup>

#### Title Search

60. Whether the ultimate product is an abstract, attorney's opinion, or title policy, the first part of the search and examination process—the search—proceeds on the basic premise that important interests in real property (deeds, mortgages, leases, grants, easements, judgments, tax liens) must be made a matter of public record by recording the document in the county recorder's office where the property is located.<sup>84</sup>

61. By recording evidence of a claim or interest in real property, legal or "constructive" notice is given—that is, all persons, including prospective buyers and lenders, are presumed to know what is in the public records even though they do not have actual knowledge.<sup>85</sup>

<sup>83</sup> CX 250G. See also CX 308B ("Title Insurance combines the function of the abstractor, in making the chain of title, and the attorney in his examination of the title, plus coverage to the land owner in the form of insurance.")

<sup>84</sup> CX 155"T", CX 156Z-32 to Z-33, CX 175B, CX 196Z-16, CX 247E; RX 389Z-245 to Z-253, RX 413C, RX 431N-P.

<sup>85</sup> CX 156Z-32 to Z-33, CX 247E, CX 253Z-3 to Z-4; RX 413C.



62. From these public records, the searcher endeavors to establish a "chain of title," consisting of a chronological account of recorded instruments affecting title, beginning with the earliest and concluding with the latest.<sup>86</sup>

63. The "direct" search method of establishing the chain of title entails an examination of public records for all documents relating to the property in question.<sup>87</sup> Historically, the presumptive search period is 60 years, but depending upon local custom or the existence of an earlier, reliable title policy, or a marketable title act, the search may be considerably shorter.<sup>88</sup> In an especially complex transaction, the search may go well beyond 60 years to the issuance of the original patent by the sovereign.<sup>89</sup>

64. Typically, the public records searched include county land records (deeds, easements, and mortgages) municipal records covering sewer, sidewalk, and other assessments, tax collector records, and state and federal court records showing bankruptcies, divorces, judgments, and civil actions indicative of liens or other enforceable interests in the property.<sup>90</sup>

65. Instead of starting with public records, which often are not efficiently organized, a search (especially in

<sup>86</sup> Sinkhorn 852-53, 856-58, Haines 3158-59; CX 196Z-16; RX 409K, RX 427Z-135, RX 431N-P.

<sup>87</sup> CX 196Z-16 to Z-18; RX 409Z-26, Z-33.

<sup>88</sup> Anito 291-93, Quadraccia 510-11, Ippel 704-05, Malaker 723-26, 743-44, 792-93, Sinkhorn 853-55, 923-24, Waiwood 1053-54, Armstrong 1147-48, Ferraro 1198; CX 87Z-32 to Z-33, CX 160M-N, CX 196Z-18, CX 223A, CX 294D.

<sup>89</sup> Quadraccia 511; CX 160M-N, CX 196Z-18, CX 223A. If a searcher has confidence in the work of a particular abstractor, he may begin the search from the point in time when the abstract ended. CX 196Z-19.

<sup>90</sup> Anito 254, 262-63, Malaker 722, 728-30; CX 196Z-17 to Z-18, CX 247G.

large metropolitan areas) may be initiated by use of a privately owned "title plant" or "abstract plant." A title plant contains virtually complete summary information (as well as some reproductions) from the public records affecting real estate title in a limited geographic area, organized and indexed in a way that enables a title search to be performed in a fraction of the time and with greater accuracy than a direct search of the public records.<sup>91</sup>

66. Title plants are owned and operated by abstractors, attorneys, real estate brokers, and title insurers or their agents.<sup>92</sup>

67. Still another method of conducting a title search is to go back no further than a pre-existing title policy or a pre-existing abstract.<sup>93</sup>

68. There are no special educational or training requirements for becoming a title searcher, and with training and experience, high school graduates soon acquire the expertise necessary to move from routine searches to more complex assignments.<sup>94</sup>

<sup>91</sup> CX 196Z-19, CX 261L-M; RX 401Z-21 to Z-24, RX 409Z-33, RX 427Z-132, RX 488H.

<sup>92</sup> CX 196Z-36; RX 290A, RX 335, RX 401Z-21 to Z-24. In some areas of the country, title plants are cooperative efforts operated by several title insurers or their agents. CX 196Z-54 to Z-55.

<sup>93</sup> Anito 251-53, 270-72, 287-89, Quadraccia 510, Waiwood 1055-56, 1097-98, 1121-22, Armstrong 1146, Bonita 1267-68, Donohoe 1665; CX 196Z-19, CX 223A; RX 389Z-246.

<sup>94</sup> Fromhold 973, Armstrong 1179; CX 172F. See also Armstrong 1151 for testimony that searchers simply pull every document that is even remotely relevant "and then leave it to the examiners or at least the head searcher to throw them out or not" and CX 196Z-36 where one respondent describes the work of a searcher as "akin to drudgery."

### Examination

69. The examination phase of the search and examination process involves a critical analysis or interpretation of the condition of title as revealed in the documents uncovered by the search.<sup>95</sup>

70. Examination may be done by approved attorneys, attorney-agents, independent attorneys, searchers, or anyone else who is experienced in interpreting title documents and is knowledgeable about real estate law.<sup>96</sup> Some examiners dispense entirely with a separate search and instead simply combine the search and examination in a single process.<sup>97</sup>

71. Similarly, while search is commonly identified as a separate and distinct process from examination by title insurers, and in large insurance company or agency offices the two processes are often performed by separate staffs, in the smaller offices, and in matters involving complex questions of title, the two processes tend to merge.<sup>98</sup>

### F. SEARCH AND EXAMINATION AND RISK ASSUMPTION

72. Respondents' retained insurance expert,<sup>99</sup> as well as respondents' officers and agents, argued that search and

<sup>95</sup> Anito 264; CX 155F, CX 156Y, Z-2, CX 160G-H, CX 237M, CX 244S, CX 249D, CX 253Z-5, CX 262"O"; RX 401Z-30 to Z-34, RX 405D.

<sup>96</sup> CX 262"O".

<sup>97</sup> CX 87M, CX 253Z-5, CX 262F.

<sup>98</sup> Anito 297, Ippel 631, 635-36, Malaker 720, Fromhold 978-79, Waiwood 1049-50, Ferraro 1200, Bonita 1260-62, Bowling 3336; CX 196Z-36, CX 237M.

<sup>99</sup> The opinions of the retained expert, Robert Holtom, were uninformed by any experience whatsoever with title insurance. Holtom 1493, 1594.

examination undertaken prior to the issuance of a title insurance policy is either "underwriting" or part of what they referred to as the "underwriting process" because it is on the basis of the search and examination that risk (chance of loss) is identified and a decision is made either to accept or reject it.<sup>100</sup> This effort of affixing the lofty "underwriter" label to searchers and examiners proceeds initially from the premise that all providers of information respecting the property to be insured must be engaged in "underwriting" (or, if you will, be part of the "underwriting process") although this expansive view of underwriting would of necessity embrace the abstractor, the independent surveyor, the approved attorney, and practically anyone else who gives insurers some information bearing on the subject of the policy, including presumably the insured himself who provides his name and a description of the property, and perhaps even the receptionist who records this information on the face of the policy.<sup>101</sup> Going beyond the illogic of this open-end definition, this endeavor to elevate searchers and examiners to the status of "underwriters" also fails to take into account the fact that the search and examination conducted for title insurance purposes is virtually indistinguishable from the process undertaken for the non-insurance (and concedely non-"underwriting") purposes of rendering abstracts or attorneys' opinions, and that irrespective of the purpose, search and examination is carried out by a corps of

<sup>100</sup> Ippel 629, Malaker 730, Fromhold 977, Waiwood 1067-68, Armstrong 1159, Bonita 1285-88, Everbach 1329-31, Holtom 1486-88, Haines 3174-81, Bowling 3294.

<sup>101</sup> Malaker 717-19, Fromhold 977-78, 1005, 1013-14, Everbach 1398-99, 1402-07, Holtom 1541-43, 1584-86, 1587-89, Haines 3196-97. See, e.g., Fromhold 977, 1108 and RX 413C for the pivotal roles played by the surveyor and abstractor (both independent contractors not connected with insurers) in the search and examination process.



searchers, abstractors, conveyancers, attorney-agents, and approved attorneys who move freely from one form of title evidence to another without any perceptible change in what they do.<sup>102</sup> Moreover, to the extent that respondent's expansive concept of underwriting rests on the assumption that searchers and examiners for title insurers have discretion about assuming risk, the record evidence is that in an industry in which standard forms predominate and company manuals have reduced most transactions to a set routine, this discretion is narrowly circumscribed.<sup>103</sup> This strained effort at rolling search and examination, underwriting, and risk into one ball of wax is also suspect on its face since the basic approach of respondents in conducting their title insurance businesses is not to assume any significant risks uncovered by searchers and examiners.<sup>104</sup> Finally, respondents' strained extension of the underwriter label to searchers and examiners is fundamentally unsound since the title policy, in contrast to casualty insurance, does not insure against the happening of some unforeseen future event, and while the searchers and examiners may bend every effort to eliminate risk by finding recorded title defects, they are not engaged in the underwriting function of assuming and spreading risk among a large universe of insureds.<sup>105</sup>

<sup>102</sup> See Findings 16-71. The occasional use of the "underwriter" title in respondents' manuals in no material way changes the way in which search and examination are conducted for a title policy as compared to the search and examination undertaken for any other evidence of title. See RX 401Z-27 to Z-34.

<sup>103</sup> See Findings 73-96 and CX 172F.

<sup>104</sup> See Findings 73-96, 99.

<sup>105</sup> Holtom 1496-98, 1505-06, Wirtz 1790-91; CX 56C-D, CX 82E, CX 87H-J, CX 116B-C, CX 156Z-2 to Z-4, CX 182D-E, CX 237Z-8, CX 250F, CX 253Z-10, CX 260H-"T", CX 262C-D, CX 292G-H, CX 294C-D, CX 3109D-F, CX 314B; RX 102Z-95 to Z-98, RX 417Z-32, RX 442; see also Findings 98, 114.

73. Consistent with respondents' guiding principle of not assuming risk, their primary objective before issuing a title insurance policy is in the conduct of an accurate search of the public title records for the purpose of uncovering possible defects which are to be cured by the insured or excepted from coverage.<sup>106</sup>

74. Also consistent with respondents' risk-avoidance approach are their company manuals, underwriting guides, and other directives, which are replete with admonitions that risks are to be excepted from coverage.<sup>107</sup> The testimony of respondents' officers and agents directed at diminishing the importance of these directives by claiming in effect that searchers and examiners have wide latitude in ignoring them,<sup>108</sup> is not credible. The insurer-agent contracts as well as the underwriting manuals, guides, and directives themselves instruct employees and agents that they are to be followed to the point that agents may be liable for damages if they are not followed.<sup>109</sup> It is also significant that while these materials are constantly being updated, no documents were offered by respondents indicating that the admonitions respecting risks have been

<sup>106</sup> CX 30Z-67, CX 91Z-85, CX 160H, CX 166Y, CX 172F, CX 175C, CX 237Z-8, CX 294C-D; RX 482B.

<sup>107</sup> CX 160H, CX 161Z-342, Z-358, Z-382, CX 184A-G, CX 192, CX 214, CX 215, CX 216, CX 219, CX 220, CX 237Z-8, CX 240, CX 241, CX 253Z-10; RX 444Q.

<sup>108</sup> See, e.g., Waiwood 1072-73, Armstrong 1161-62, Ferraro 1200, Haines 3123-25, 3146-49, Bowling 3331-33.

<sup>109</sup> CX 140B, CX 145B-C, CX 160H, CX 228A, CX 232C, CX 237Z-3 to Z-6, CX 309Z; RX 413L, RX 482A. See also Sinkhorn 903-04, Haines 3225-26, Bowling 3300-05 for testimony by respondent officials that agents are audited to determine whether they have complied with respondents' manuals and underwriting guidelines, and that the terms of the agent-insurer contracts must be observed.

significantly modified.<sup>110</sup> On the contrary, respondents' own witness acknowledged that the manuals, underwriting guides, and directives are meant to be followed, and are written in absolute terms because respondent insurers do not want their agents and employees, whose primary function is to generate business, to be making risk decisions that could result in huge claims.<sup>111</sup>

#### The Title Report Or Binder

75. That the restrictions in respondents' manuals on risk assumption are followed (in the sense that searchers or examiners typically neither eliminate nor make any decision to insure over enforceable defects) is clearly demonstrated by the process for working up the standard form reports or binders provided to respondent insurers by the American Land Title Association (ALTA), and used whenever title insurance is being acquired, irrespective of how the responsibility for search and examination may have been allocated among agents, approved attorneys, or insurance company employees. These standard title reports (also referred to as commitments or binders) purport to show the condition of title as of the date of the

<sup>110</sup> Haines 3118-20, 3126. See also Haines 3124, 3139-40 for testimony that until guides are changed they should be taken literally and Statton 2872-73 for the statement that manuals are "a broad set of operating guidelines for specific questions that they [branches and regional offices] may have, to save them the time of calling the home office to find out what they should do." The suggestion advanced by respondents that the underwriting guides are only used by "a real green horn" (see, e.g., Haines 3123) is meaningless. While agents or employees may only consult the guides until they become familiar with the contents, it would be absurd to deny that the experienced agent or employee has not incorporated into his total experience the risk limitation admonitions to which he has been exposed from the start of his career.

<sup>111</sup> Fromhold 1000-01, Haines 3117, 3123-25.

search and examination, and are enforceable contracts constituting an agreement by the insurer to issue a policy subject to certain standard requirements and a standard limitation.<sup>112</sup> The standard requirements are the payment of the purchase price for the property, recordation of the deed, and payment of the title insurance premium. The heart of the title report, however, is a standard limitation in the form of a general notice that the policy will not insure against loss from any title defects listed on Schedule B of the title report, or any new title defect arising between the date of the report and satisfaction of the standard requirements.<sup>113</sup>

76. As a matter of strict rule, respondent insurers require that their agents and employees indicate all enforceable or even doubtful title defects, liens, and encum-

<sup>112</sup> Anito 265-66, Quadraccia 490, Ippel 662-63, Fromhold 1033, Waiwood 1078-79, 1099-1100, 1103; Armstrong 1165-66, Bonita 1276-77, Everbach 1324, Bowling 3268, 3337-38; CX 155D-E, CX 252S, CX 253Z-9 to Z-10, CX 297, CX 302B, CX 320Z-157 to Z-159, CX 342F; RX 3D, RX 417Z-34 to Z-35, RX 487F. Although respondents apparently prefer the designation "commitment" as a way of distinguishing the preliminary report from the abstractor's or attorney's statement of the condition of title, the search and examination is the same for report, binder, or commitment, and there is no evidence that the contents of these pre-policy documents change depending on what they are called. See RX 400Z-84 to Z-95. By the same token, notwithstanding the similarity between a title report and an attorney's opinion, respondents scrupulously avoid the attorney's opinion designation since its use might bring a charge of unauthorized practice of law. Everbach 1328-29, Bowling 3293-94.

<sup>113</sup> CX 252S; RX 420Z-4 to Z-10. Schedule B of the title report contains two sections: section 1 specifies those acts, such as paying off an existing mortgage, that must be performed before the policy issues; section 2 lists the matters which will constitute exceptions on Schedule B of the final policy. CX 222Z-90.



branches on Schedule B of the title report.<sup>114</sup> Thus the title report issued by the attorney as an agent for an insurer is virtually indistinguishable from the attorney's opinion or certification that is issued by the same attorney when he is not acting as an insurance company agent.<sup>115</sup>

77. Respondents' officers and agents made extravagant claims in their direct testimony about the alleged underwriting discretion that agents and employees, as searchers and examiners, exercise in writing title reports or final policies. The cross-examination of these same witnesses clearly demonstrated, however, that legally enforceable easements, mortgages, restrictive covenants, liens, assessments, and encroachments must be shown on Schedule B of the title report, and that this so-called discretion is narrowly limited to not showing minor, insignificant, and technical title defects ("glitches," "fly specks" or "nits and bits") such as ancient and patently unenforceable mortgages, easements, liens, or covenants, which if not cleaned up would in effect give an inaccurate picture of the true state of title.<sup>116</sup>

<sup>114</sup> Anito 264-66; CX 156Z-45 to Z-46, CX 161Z-34, Z-342, Z-358, Z-382, CX 179L, CX 184A-G, CX 197C, CX 199A, CX 214, CX 215, CX 216, CX 219, CX 220, CX 222Q, Z-64, Z-99, CX 227Z-40, CX 230A, CX 232C, CX 237"O", CX 240, CX 241, CX 254Z-7, CX 320Z-159, CX 342F-M; RX 420.

<sup>115</sup> Anito 279-80. As a matter of form, the minor "glitches" that may be dropped entirely from the title report may be included in the attorney's opinion accompanied by an explanatory discussion. Anito 305-06, 315-316.

<sup>116</sup> Ippel 639-40, 649-51, 664-67, Malaker 732-34, 748, 793-800, Sinkhorn 867-74, 887, 906-14, Fromhold 965-71, 1005-10, Waiwood 1060-61, 1064-65, 1079-80, 1084-86, 1101-03, Armstrong 1141-42, 1167-68, 1171-72, Ferraro 1228-29, Bonita 1280-86, 1291, 1295-1300, 1302-03, Everbach 1320, 1354-55, 1393-96, Haines 3120-21, 3130-31, 3222, 3230-31, 3233-37, 3240-43, Bowling 3286-87, 3294-95, 3339-44. See also CX 91Z-38, CX 161Z-36, CX 196Z-16, Z-139, CX 237N-"O", CX 342"T"-M; RX 420-RX 420A.

78. That the discretion given to searchers and examiners is severely limited to title objections which are insignificant is demonstrated by the absence of credible evidence that respondent insurers have incurred any significant losses traceable to the exercise of discretion by searchers and examiners in eliminating minor title defects.<sup>117</sup>

79. Moreover, in sharp contrast to testimony from company officials and agents about searcher and examiner discretion, the insurer-agent agreements and company directives contain explicit requirements that the agent, without any discretion, must list all material title defects as exceptions on Schedule B of the title report.<sup>118</sup>

80. Similarly, when a title report is to be issued on the basis of an approved attorney's certification, the approved attorney is required to list all valid mortgages, judgments, liens, and other material title defects in his certification.<sup>119</sup> But the approved attorney, like the attorney-agent, does not include in his certification clearly technical and in material title defects.<sup>120</sup>

81. Independent abstractors, who may perform searches for title insurers or their agents prior to the issuance of a pre-policy report, typically note all pertinent defects, encumbrances, and liens. They usually have no discretion to omit any outstanding interest, no matter how insignificant it may appear.<sup>121</sup>

<sup>117</sup> See Anito 342, Sinkhorn 906, 911-12, Fromhold 1007, 1011, Armstrong 1174.

<sup>118</sup> Sinkhorn 922-23; CX 138B, CX 182G, CX 230A, CX 231A-B, CX 232C, CX 320Z-157.

<sup>119</sup> CX 160G-H, CX 196Z-11 to Z-12, CX 237Z-9 to Z-14; RX 410P.

<sup>120</sup> Sinkhorn 928, Haines 3235-36, Bowling 3361-63, 3379-80; CX 160H, CX 196Z-11 to Z-12.

<sup>121</sup> Cooper 365-67, 370-72, Everbach 1341; CX 253Z-5.

82. These restrictions on the discretion of agents, approved attorneys, and abstractors reflect not only respondents' own basic philosophy of avoiding risk, but also proceed from respondents' legal obligation to inform the prospective owner of all outstanding defects in title,<sup>122</sup> and the stringent disclosure requirements imposed by the federal guarantors—Government National Mortgage Association (GNMA) and Federal National Mortgage Association (FNMA)—who dominate the secondary mortgage market.<sup>123</sup>

83. Once enforceable or even doubtful title exceptions appear on Schedule B of the title report of the agent (or in the certifications of the approved attorney or abstractor) they are subject to strict legal review at the regional, divisional, or corporate level of respondents before being considered for either affirmative coverage or elimination from the final policy.<sup>124</sup>

84. In practice, a decision is rarely made at any level of respondent insurers by which affirmative coverage is extended over a significant disclosed defect, and the common rule in the title insurance industry is that enforceable title defects appearing on Schedule B of the title report will inevitably appear as specific exceptions on Schedule B of the final policy unless the insured takes corrective steps (for example, payment of mortgage money or posting of

<sup>122</sup> Ippel 663, Malaker 756-57, Waiwood 1103, Wilkie 2109-10, Bowling 3339-40; CX 183, CX 184A-G, CX 192, CX 198B, CX 221, CX 222Z-64, CX 251A-B, CX 320Z-157 to Z-158.

<sup>123</sup> Malaker 808, Bonita 1300-01, Everbach 1398, Haines 3231, Bowling 3342-44; CX 155F, CX 193A-E, CX 253Z-31 to Z-32, CX 303A-B, CX 320Z-159.

<sup>124</sup> Bowling 3278-79, 3294-95; CX 145B, CX 146B, CX 218, CX 220, CX 221, CX 222Q, Z-25, CX 223B; RX 387, RX 396H, RX 410D, Z, Z-2, RX 413M.

bonds to satisfy existing tax or judgment liens) to cure them.<sup>125</sup>

#### The Title Insurance Policy

85. The formal title policy continues the process begun in the preparation of the title report of identifying risks which are not to be insured. Thus the face page of the standard-form owner's policy (ALTA Form B-1970), which is used throughout the title insurance industry,<sup>126</sup> begins with the declaration that the policy does not cover the exclusions or the exceptions appearing on Schedule B of the policy. The standard terms are as follows:

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, [X, Y, Z] TITLE INSURANCE COMPANY . . . herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;

<sup>125</sup> Anito 265-67, Cooper 372-73, Sinkhorn 887-88, Waiwood 1067, Armstrong 1172, Bonita 1302, Everbach 1396-97, Haines 3234-35; CX 30Z-67, CX 87K, CX 160H, CX 196Z-144, CX 237Z-8, CX 247F, J, CX 252S, CX 260G, CX 292G-H, CX 294C, CX 297, CX 322Z-117; RX 102Z-96, RX 413D, RX 482B, RX 488"T".

<sup>126</sup> Cooper 360, Bonita 1302; CX 171; RX 102Z-125, RX 428Z-136, RX 431Y.



2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land; or
4. Unmarketability of such title.<sup>127</sup>

86. The standard exclusions, cited on the face page of the policy, are designed to reduce insurer risk by use of the following language:

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.

<sup>127</sup> RX 389Z-387. The face amount of the standard owner's policy is the purchase price. Anito 273; CX 247V. The standard mortgagee's policy, which covers the face amount of the loan, has similar coverage except for the addition of provisions insuring the priority of the mortgagee's lien. The mortgagee's policy also has provisions which are similar to the standard exclusion as well as the standard exceptions appearing in Schedule B of the owner's policy. Ippel 626, Haines 3179-80, Bowling 3272; CX 182J-L, Z-90 to Z-95; RX 389Z-408, RX 405Z-172. Owner's and lender's policies may be combined in one simultaneous policy. CX 182L, Z-96.

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.<sup>128</sup>

87. Schedule B of the standard ALTA policy then lists five general exceptions —

- (1) Rights or claims of parties in possession not shown by the public records.
- (2) Encroachments, overlaps, boundary line disputes, and any matters which would be disclosed by an accurate survey and inspection of the premises.
- (3) Easements or claims of easements not shown by the public records.
- (4) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
- (5) Taxes or special assessments which are not shown as existing liens by the public records.<sup>129</sup>

<sup>128</sup> RX 389Z-392.

<sup>129</sup> RX 389Z-397.

88. Some of the five "off-record" general exceptions (on either the final policy or the earlier report) may be removed, without creating significant risk to the insurer, by various off-record procedures such as a survey of the property, or by obtaining an indemnity, waiver, release, or proof of payment of taxes.<sup>130</sup> The removal also requires the purchase of an extended coverage policy.<sup>131</sup> Moreover, if the off-record inquiry discloses any significant title defect, that defect, too, will inevitably appear in the special exception portion of Schedule B.<sup>132</sup>

89. What are not eliminated from Schedule B of the policy are the special exceptions representing the enforceable easements, restrictive covenants, use restrictions, and liens which first appeared on Schedule B of the title report (see Finding 76) and which were not subsequently removed by the insured. As a matter of strict rule, respondent insurers require that company agents and employees must show all enforceable title defects on Schedule B of the policy as special exceptions to coverage.<sup>133</sup>

#### Risk Assumption By Title Insurers

90. As indicated in Finding 84, significant defects to title uncovered during the search and examination process are usually either cured by the insured or excepted from coverage since the basic approach of respondent title insurers is to avoid risks and not to insure suspect titles.

<sup>130</sup> Anito 276, Haines 3202-17; CX 182J, L, CX 222Z-47, Z-54 to Z-61, CX 247J, CX 248N-"O", CX 295E; RX 480-RX 480A.

<sup>131</sup> CX 247J, CX 298B, CX 302B; RX 15A-B, RX 417Z-36 to Z-37.

<sup>132</sup> CX 242B, CX 248N, CX 295E; RX 428Z-338.

<sup>133</sup> Armstrong 1171-72, Bonita 1302; CX 161Z-342, Z-382, CX 184A-G, CX 214, CX 216, CX 219, CX 220, CX 221, CX 240, CX 241, CX 247J, CX 254Z-7, CX 292Q-R.

91. Thus, like abstractors and independent attorneys, the most significant risk that title insurers face is whatever peril attaches to conducting a competent search and examination of the public records.<sup>134</sup>

92. The risk to insurers from negligence in the title search and examination process is reduced, however, by the contractual relationship between insurers and abstractors, independent attorneys, approved attorneys, and agents which expressly provides for negligence liability in conducting the search and examination.<sup>135</sup> In addition, agents are commonly required to carry errors and omissions insurance,<sup>136</sup> and approved attorneys are usually required to have professional liability coverage.<sup>137</sup>

93. The risk from hidden title defects—forgery (the main danger), false impersonation, or the execution of documents by minors—which cannot be addressed by the search and examination process, represents a relatively minor portion of the already small number of claims paid by title insurers.<sup>138</sup>

94. In a rare number of instances, if an uncovered title defect is not cured, and if the risk is both calculable and low (and assuming further that indemnities or extra premiums have been received from the insured), respondent insurers may make a decision to give affirmative coverage by insuring "over" a known title defect appearing

<sup>134</sup> Anito 277-78, Quadraccia 505, Sinkhorn 919, Haines 3166-68; CX 156Z-4, CX 172J, CX 181G-H, CX 222Z-11, CX 300A, CX 309Y; RX 397, RX 442A-B.

<sup>135</sup> CX 138C, CX 140B, CX 145C, CX 146D, CX 160G, CX 228C, CX 230B, CX 231C, CX 261"T"-K; RX 410J. See also CX 186A-B, CX 187A-B, CX 309P, and RX 390A for references to the common law negligence liability of abstractors and agents for errors and omissions in preparing abstracts and reports for title insurers.

<sup>136</sup> Ferraro 1237; CX 138C, CX 145B, CX 146D, CX 180Z-62, CX 231B, CX 232E.

<sup>137</sup> CX 230C; RX 410L, RX 413J-K, RX 444N.

<sup>138</sup> CX 30Z-67 to Z-69, CX 196Z-121 to Z-122; see also Finding 99.



in Schedule B of the title report or the policy.<sup>139</sup> Considering the severely restrictive conditions under which affirmative coverage is given, it naturally follows that losses due to such coverage are rare.<sup>140</sup>

95. For the most part, agents and branch employees of respondent title insurers are prohibited from giving affirmative coverage for a known risk without the prior approval of respondents' supervisory regional, divisional, or home office underwriting staffs.<sup>141</sup> There is no evidence that any title insurer has incurred any loss by reason of an agent's decision to insure over a known title defect without obtaining such prior approval.<sup>142</sup>

96. Significant title defects are insured over (in those rare instances when it is done) on the basis of case-by-case legal analysis by respondents' underwriting staffs located in divisional or regional offices, and in the case of substantial risk by "risk committees" located in the home offices.<sup>143</sup>

<sup>139</sup> CX 87K, CX 155C, CX 181H, CX 182M, CX 196Z-139 to Z-140, CX 294D, CX 297, CX 322Z-117; RX 413T, RX 443M, RX 444Y. Even when a title insurer insures "over" a known defect, the common practice is still to list the defect on Schedule B, and then issue affirmative coverage as a way of limiting the insurer's liability for unmarketability of title. Armstrong 1173, Everbach 1344-45, Bowling 3273, 3299, 3344-45.

<sup>140</sup> Sinkhorn 919-20, Armstrong 1174.

<sup>141</sup> Malaker 777, Fromhold 946-47, 949-50, 1010, Bonita 1302-03, CX 145B, CX 146B, CX 160H, CX 161Z-43, Z-136 to Z-138, Z-153 to Z-154, CX 179L, CX 182M, CX 202L, CX 218, CX 220, CX 222S, Z-11 to Z-12, Z-18, Z-25, Z-65, Z-217 to Z-218, CX 223B, CX 230A, CX 237Z-8 to Z-9, CX 322Z-117, CX 342N-"O", Q; RX 387, RX 410Z to Z-4, RX 413M, T, RX 444Y. The exceptions to this general rule relate to a limited set of circumstances tightly controlled by the insurance companies such as matters with an established expiration date, claims that can be satisfied by the payment of a sum of money, legally unenforceable restrictive covenants, and minor discrepancies in set-back lines. CX 161Z-137 to Z-138, CX 222Z-65, Z-214 to Z-219, CX 237Z-8 to Z-9.

<sup>142</sup> See Fromhold 1011.

<sup>143</sup> Bowling 3266-67, 3278-79, 3281, 3295-96; CX 160H, CX 182M, CX 218, CX 237Z-8 to Z-9, CX 322Z-117; RX 464E-F, RX 482B-C.

97. Another factor taken into account by a title insurer in deciding whether to give affirmative coverage is competitive pressure from other title insurers.<sup>144</sup>

93. There is no evidence that in those rare instances when uncovered risks are insured over, this somehow involves a pooling of the risk experience of a group of insurers, or even represents an actuarial assessment of risk by an individual insurer.<sup>145</sup>

#### Claim Payments

99. That all risks assumed by respondent title insurers—whether from a negligent search and examination, or from hidden defects, or from insuring over uncovered defects—are minuscule is shown by the history of claim payments. Only about five to ten percent of a title insurer's gross premium income is used to pay actual losses while over 90 percent is absorbed by operating expenses, mainly the cost of searching and examining title.<sup>146</sup> In contrast, the average loss ratio for homeowner's multiple peril insurance is approximately 65 percent, and the ratio for the other lines of casualty insurance is still higher.<sup>147</sup>

100. The one-time premium, which is based on the purchase price of the property or the amount of the mortgage, further distinguishes title from true risk insurance.<sup>148</sup> Thus in contrast to title insurance, casualty

<sup>144</sup> Waiwood 1058, 1080, 1086, 1125, Armstrong 1159-60, Bonita 1294-95, Bowling 3277-79; CX 189Z-17, CX 237Z-6 to Z-7; RX 482B-C, RX 483C, RX 484-484B.

<sup>145</sup> See Holtom 1505-06 and Finding 114.

<sup>146</sup> CX 30Z-67 to Z-68, CX 91Z-84 to Z-85, CX 116D, CX 156Z-3 to Z-4, CX 166Y-X, CX 262R; RX 92Y, RX 102Z-95 to Z-98, RX 364C. See also Anito 277-78, Armstrong 1181, Bethel 1952-53.

<sup>147</sup> Bethel 1994-95; CX 91Z-84, CX 116D.

<sup>148</sup> CX 156Z-3, CX 260H. The one-time premium is the only charge for title insurance so long as the named insured retains an interest in the property. CX 182E.

insurance involves variable annual premiums that assumes a yearly review followed by a decision as to whether or not coverage is to be renewed or amended depending on risk assessment.<sup>149</sup>

101. The difference between title insurance and casualty insurance is also shown by the restrictions in most states preventing title insurers from engaging in any form of casualty insurance for the very reason that these states did not want title insurers to assume risks.<sup>150</sup>

### G. TITLE INSURANCE RATES

102. Respondents and state insurance departments recognize that there is a sharp distinction between the two things that title insurance companies do—that is, first, provide a service by informing buyers and lenders of the existence of title defects, and second, indemnify buyers and lenders for the small volume of claims that are paid either because of insuring over risks, or hidden risks, or errors in the search.<sup>151</sup>

103. In the context of rate making, this two-faceted nature of their operations is reflected in the fact that respondents' rate manuals often separate out a small charge for indemnification (what is euphemistically called the "risk" rate for whatever risks are assumed) from a large charge for conducting a search and examination.<sup>152</sup> The "risk" rate is not challenged in this proceeding (except

<sup>149</sup> CX 253Z-10, CX 260H.

<sup>150</sup> CX 260D; RX 102Z-99.

<sup>151</sup> Wirtz 1808-09, Haines 3224-25, Fraundorf 3442-43; JXA, p. 89; CX 56B-D, CX 91Z-35, Z-38 to Z-39, CX 130G, CX 131B, CX 133F, CX 156Z-3 to Z-4, CX 208A-C, CX 261"T"-K, CX 293D; RX 167C-D.

<sup>152</sup> Everbach 1377; CX 110B, E, CX 130A to Z-2, CX 132F, CX 155C, CX 222Z-75, CX 237Y to Z-1, CX 273C, CX 311G; RX 3E.

for Ohio, see Findings 158-61), which essentially involves those few states which have required title insurers to file risk as well as search and examination rates, and have allowed both rates to be set by rating bureaus.

104. Prior to October 1983, Connecticut had both an "Approved Attorney Plan" as well as the much larger "All-Inclusive Rate Plan" that included fees for search and examination performed by agents or employees.<sup>153</sup> The Approved Attorney Rate (in the special jargon of the title insurance industry) only covered the risk portion of the premium, the assumption being that approved attorneys would charge an additional and unregulated fee for search and examination.<sup>154</sup> Since October 1983, however, Connecticut has only had a risk rate. The change was intended to reflect the prevalence of the approved attorney system in Connecticut and the redundancy of an all-inclusive rate.<sup>155</sup>

105. Pennsylvania, too, has an "approved attorney" rate representing the risk portion only of the total premium (the assumption again being that the approved attorney will bill the consumer separately for an unregulated search and examination fee) as well as an inclusive rate, embracing risk as well as charges for search and examination. The inclusive rate applies when the services are performed by insurance company employees or agents.<sup>156</sup>

<sup>153</sup> CX 25B, CX 29B-C, CX 30Z-84 to Z-86, CX 35A-D; RX 101A, RX 102"O"-P.

<sup>154</sup> DiSanto 2753-55. While putatively unregulated, in practice approved attorneys' charges for search and examination reflect the difference between the inclusive rate and the Approved Attorney Rate. DiSanto 2754.

<sup>155</sup> DiSanto 2749-50; CX 32A-X; RX 103A-B.

<sup>156</sup> CX 130A-CX 136D, CX 145E; RX 35J.



106. Until September, 1983, New Jersey had separate rate schedules for risk and search and examination.<sup>157</sup> The risk rate, as in Connecticut and Pennsylvania, was designated as the "Approved Attorney Rates" and covered "title insurance underwriting only."<sup>158</sup> Since September, 1983, New Jersey has only published an inclusive rate that simply combines the risk rate with the search and examination charge.<sup>159</sup>

107. Montana has an inclusive rate, combining a discrete small charge for risk (designated as the "title insurance premium" and constituting 20% of the rate) and a much larger charge (representing 80% of the total filed rate) for search and examination.<sup>160</sup>

108. Idaho has an inclusive rate which combines a risk charge and a fee for performing the search and examination service. The rates are described as "the total title insurance fees charged the applicant including both the risk portion and the service or work portion. . . ."<sup>161</sup>

109. Arizona has an inclusive rate. It combines the "portion of the fee . . . for the assumption by the title insurer of risk" as well as search and examination fees.<sup>162</sup>

110. Ohio has a "risk" rate, which applies only to risk assumption or underwriting expense, and does "not include costs involved in the production of title evidence."<sup>163</sup>

<sup>157</sup> CX 276A-CX 283Z-15; RX 3 to RX 3Z-54.

<sup>158</sup> RX 3E, "T".

<sup>159</sup> CX 284A-CX 285W; RX 30-RX 30C.

<sup>160</sup> CX 41K.

<sup>161</sup> CX 56Q.

<sup>162</sup> JXA, p. 89; CX 9a to Z-52.

<sup>163</sup> RX 290. See also RX 289 for statement by the Ohio Department of Insurance that Ohio rates do not include a "work charge."

111. Prior to 1984, Wisconsin had a so-called "original" rate, which was simply the addition of two discrete components—a small "risk fee" and a much larger search and examination charge.<sup>164</sup> While the "original" rate has been published since 1984 without the two components, it clearly represents the simple addition of a risk fee and a search and examination charge.<sup>165</sup>

#### Title Insurance Rating Bureaus

112. Title insurance rating bureaus are private organizations organized by respondents and other title insurers doing business in a particular state for the purpose of establishing uniform rates for their members.<sup>166</sup> Uniform rates are established by rating bureaus notwithstanding differences in efficiencies among the members, especially differences in the cost of conducting search and examination.<sup>167</sup>

113. Where a title insurance rating bureau establishes either an inclusive rate or a separate rate schedule for search and examination, the rate making function of the bureau is usually supported by profitability studies furnished by retained experts. These studies dwell mainly on the cost of carrying out the search and examination, including the fixed costs of title plants, which must be maintained irrespective of fluctuations in the real estate market.<sup>168</sup>

<sup>164</sup> CX 114K, CX 124J.

<sup>165</sup> Wirtz 1794, 1808-09; CX 127J.

<sup>166</sup> DiSanto 2727; CX 171, p. 58, CX 222Z-76.

<sup>167</sup> RX 325.

<sup>168</sup> Plotkin 2457-66; CX 30A to 30Z-98, CX 56A to 56Z-15, CX 208A-C; RX 39 to 39Z-16, RX 91 to 91Z-80, RX 102 to RX 102Z-126, RX 167-RX 167X, RX 364 to RX 364Z-7. Fluctuations in the real estate market are responsible for the cyclical nature of title insurer earnings. Bethel 1969-70; CX 91Z-92 to Z-93; RX 3U-V, RX 102J-K.

114. There is no evidence that title insurance rates are set collectively through rating bureaus as a way of obtaining intra-industry cooperation in the pooling of risk information. As a matter of fact, there is no evidence that any title insurer, whether operating through a rating bureau or otherwise, sets rates by referring to actuarially determined loss experience.<sup>169</sup> As the New Jersey Title Insurance Rating Bureau put it:

. . . it is not possible to set up an actuarial standard for risk assumption based on loss experience. Risks in the title insurance industry are of too low an incidence and too random a character to justify this type of rate determination.<sup>170</sup>

115. There is also no evidence that title insurance rating bureaus are necessary in order for respondents to operate as profitable and reliable insurers.<sup>171</sup> Nor is there any evidence that rating bureaus are necessary in order for the states to regulate title insurers effectively.<sup>172</sup>

#### H. STATE AUTHORIZATION AND ACTIVE SUPERVISION OF TITLE INSURANCE RATING BUREAUS

##### Authorization

116. Complaint counsel concede that the joint rate making activity by rating bureaus in six of the eight states remaining in this proceeding was authorized by state law. The issue of state authorization only arises with respect to rating bureau activity in Pennsylvania and New Jersey, and pertains only to fees charged by attorney-agents (see Findings 117-123).

<sup>169</sup> See Wirtz 1790-91; CX 56B-D, CX 82E, CX 91G, CX 156Z-3 to Z-4; RX 39B, RX 102Z-15, RX 167C-D, RX 241-241A.

<sup>170</sup> RX 3Z-4.

<sup>171</sup> See Everbach 1410-11, Wilkie 2130-31, Bowling 3357-58.

<sup>172</sup> See Wirtz 1769.

#### Pennsylvania

117. Complaint counsel's case with respect to the authorization issue in Pennsylvania rests solely on Section 701(5) of the Pennsylvania Insurance Company Law, which broadly provides that fees for title insurance are subject to regulation but contains the following proviso:

"Fee" for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor, and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company, or any charges made for special services not constituting title insurance, even though performed in connection with a title insurance policy or contract.<sup>173</sup>

118. There is no dispute that when a Pennsylvania attorney-agent, in connection with the issuance of a title policy, receives a premium from a client, a part of that premium is retained by the attorney-agent as his fee for conducting the search and examination.<sup>174</sup> The record

<sup>173</sup> JXA, p. 45.

<sup>174</sup> CX 138E, CX 140C, CX 143A-C, CX 145A-E, CX 146A-F.



also shows that the total premium including the portion retained by the attorney-agent was fixed by the Pennsylvania Title Insurance Rating Bureau when it set an inclusive rate.<sup>175</sup> Complaint counsel argue, however, that since Section 701 excludes "any charges paid by an insured . . . to an attorney at law acting as an independent contractor and retained by such attorney at law" the Pennsylvania Rating Bureau had no statutory authority to set an inclusive rate embracing the search and examination charges of an attorney-agent.

119. The Pennsylvania Insurance Department has filed a brief (*Amicus Curiae Brief of The Commonwealth of Pennsylvania Insurance Department*, March 3, 1986) in which it argues for an interpretation of Section 701 that would make inclusive insurance rates applicable to attorney-agents. In support of this position, Pennsylvania essentially makes three points. First, the interpretation urged by complaint counsel is contrary to the actual practice of the Pennsylvania Insurance Department.<sup>176</sup> Second, complaint counsel's interpretation would leave an unintended void in state regulation based upon the totally irrelevant factor of professional affiliation, and thus is contrary to the Pennsylvania practice of narrowly interpreting legislation that might create such a void.<sup>177</sup> And finally, the intention of the state legislature was not to give a blanket exception but only to exclude from Section 701 those aspects of an attorney-agent's law practice that are unrelated to title insurance such as the issuance of an attorney's opinion (see Finding 46 for evidence that an attorney may function as an independent attorney issuing attorney's opinions as well as an attorney-agent or approved

<sup>175</sup> RX 38F.

<sup>176</sup> *Amicus Brief*, p. 13.

<sup>177</sup> *Amicus Brief*, pp. 15-16.

attorney) under the rationale that attorneys, *qua* attorneys, may only be regulated by the judicial branch of the Pennsylvania government.<sup>178</sup>

120. Complaint counsel concede that Pennsylvania actively supervises all aspects of title insurance, and the record shows that the state has a long history of aggressive regulation of title insurance.<sup>179</sup> Moreover, no evidence was presented that anyone in Pennsylvania—insurance regulators, consumers, bar, the real estate industry—have endorsed complaint counsel's reading of the statute.

121. Effective February 28, 1986, the Pennsylvania Title Insurance Rating Bureau surrendered its license to the insurance department.<sup>180</sup>

#### New Jersey

122. Complaint counsel argue that in New Jersey, as in Pennsylvania, there is no statutory authorization for the fixing by the New Jersey Land Title Insurance Rating Bureau of an inclusive rate applicable to searches and examinations carried out by attorney-agents. The relevant statute, *N.J. Stat. Ann.* 17:46B-1(f), which constitutes complaint counsel's entire case on this point, reads in pertinent part—

"Fee" for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and ever other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" shall not include any charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.<sup>181</sup>

<sup>178</sup> *Amicus Brief*, pp. 10-13.

<sup>179</sup> See, e.g., RX 35 to RX 35Z, RX 37 to RX 37"O", RX 43.

<sup>180</sup> *Amicus Brief*, p. 1, n.1.

<sup>181</sup> JXA, p. 3.

123. As in Pennsylvania, the history of title insurance rate regulation in New Jersey suggests that the state intended that inclusive rates should apply to attorney-agents,<sup>182</sup> and while the New Jersey statute is as ambiguous as Pennsylvania's, complaint counsel offered no testimony, documentary evidence, or legislative history supportive of its interpretation. The only light shed on the statute in this record is that the proviso probably represented a legislative concession to the organized bar's insistence that the state insurance department not infringe on any non-insurance aspect of an attorney's practice.<sup>183</sup>

#### Active State Supervision

124. New Jersey and Pennsylvania aside,<sup>184</sup> the state action issue in the six states remaining in this proceeding —

<sup>182</sup> During the course of the insurance department's review of rating bureau submissions, no question was ever raised about inclusion of attorney-agents in the inclusive fee schedule. Clayton 1833-35, 1845-47, 1852, 1860. Moreover, despite New Jersey's long history of vigorous opposition to title insurer rate increases and practices from a coalition of real estate attorneys, bankers, builders, and notwithstanding the presence in New Jersey of an insurance ombudsman or public advocate, no one has ever suggested that attorney-agents should be excluded from rate regulation by reason of the interpretation of the statute advanced by complaint counsel. See Clayton 1850-51, 1860-63; CX 276A-R.

<sup>183</sup> See Clayton 1832-33, 1837-42.

<sup>184</sup> On the question of state supervision in New Jersey and Pennsylvania, complaint counsel have entered into the following stipulation:

For purposes of this litigation, complaint counsel will not contest the issue of the level of state supervision under the state action doctrine in New Jersey and Pennsylvania. Complaint counsel has not conducted a detailed factual analysis of the level of state supervision in these states but, solely for purposes of expediting this litigation, agree with respondents to stipulate that

Connecticut, Wisconsin, Arizona, Ohio, Idaho, and Montana — turns on whether the joint rate making with respect to title insurance in general, and search and examination in particular, is actively supervised by these states. This determination, which must be made on a state-by-state basis, requires an examination of each state's basic regulatory scheme for title insurance, and how that regulatory scheme responded to readily identifiable areas of concern in the rate making process (see Findings 125-179).<sup>185</sup>

#### Connecticut

125. The Connecticut title insurance rating bureau (the Connecticut Board of Title Underwriters, hereinafter the "Connecticut Rating Bureau") was authorized to establish joint rates for its members after receiving a license from the state's insurance commissioner in 1965.<sup>186</sup>

126. The Connecticut Rating Bureau was subject to a wide array of latent powers possessed by the insurance

there has been active state supervision in New Jersey and Pennsylvania sufficient to satisfy the second prong of the state action doctrine as set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 102 (1980). RX 43-RX 43A (Stipulation dated 11-25-85).

<sup>185</sup> The fact that state regulators participate in the proceedings of the National Association of Insurance Commissioners (NAIC), including the drafting of a Model Title Insurance Act, tells us nothing about how actively these state regulators actually supervise in their own states. In short, while enactment of the NAIC Model Title Insurance Act may be indicative of a state's determination to supervise certain insurer practices (see note 269, *infra*), there is no convincing evidence that NAIC proceedings are a surrogate for supervision, nor is there any proof that NAIC mandated statistical reports are used or are useful for supervising insurers. See, e.g., Wilkie 2123-24, DiSanto 2795-96, Bowling 3358, Fraundorf 3445.

<sup>186</sup> DiSanto 2727-28; JX A, pp. 142-45; RX 102C.



commissioner including the authority to conduct audits, revoke the bureau's license, hold hearings respecting rates, and rescind previously filed rates.<sup>187</sup> In practice, however, the insurance department neither audited the bureau nor did it hold any hearings respecting a bureau rate filing.<sup>188</sup>

127. Since 1982 Connecticut has used a "file and use" approach, under which insurers, including insurers operating through rating bureaus, must file rates and wait 30 days before using them. If not disapproved by the insurance commissioner during the 30 days, the rates are "deemed" approved under a "deemer" provision. Prior to 1982, Connecticut allowed rates to be used as soon as they were filed.<sup>189</sup>

128. The basic policy of Connecticut is that there should be minimum state involvement in regulation of title insurance rates, the assumption being that rates should be set by the competitive market.<sup>190</sup>

129. Notwithstanding its policy of encouraging competition, Connecticut authorized joint title insurance rate making by the Connecticut Rating Bureau on the further assumption that the bureau's non-competitive rate making process would be scrutinized under the state's general statutory standard of review, i.e., that the rates should not be excessive, inadequate, or unfairly discriminatory.<sup>191</sup>

<sup>187</sup> JX A, pp. 145-58.

<sup>188</sup> Ferraro 2341, DiSanto 2777-78, 2793. Connecticut law does not require that insurance rate filings be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing. State insurance regulators are opposed to any such strict procedural requirements on the grounds of cost, and the inevitable delay that such procedures would entail. DiSanto 2769-70, Bell 2841-42.

<sup>189</sup> DiSanto 2813-18; JXA, p. 156.

<sup>190</sup> JXA, pp. 159-60.

<sup>191</sup> DiSanto 2818; JXA, pp. 141, 156. See also CX 293C.

130. The Connecticut Rating Bureau filed only two major rate increases with the Connecticut Insurance Department—in 1966 and on December 3, 1981.<sup>192</sup> With the passage of time, the facts relating to the 1966 filing are elusive,<sup>193</sup> but it is apparent that the main concern of the insurance department centered on whether the 1966 rate should be for "risk" only or should also include search and examination. On April 3, 1966, the department wrote to the bureau—

We feel that the filing should include insurance rates only and not the fees for the cost of examination of title. We need justification for such rates as well as the breakdown of the premium dollar. How will statistics be kept for this line of insurance? Will reserves be at least equal to those required under the New York law? What states have approved similar filings and what rates became effective?<sup>194</sup>

After an exchange of correspondence on the point, the insurance department approved the bureau's rate, effective August 15, 1966,<sup>195</sup> although there is no evidence that the department's request for justification relating to this rate was ever answered satisfactorily.<sup>196</sup> As approved, the 1966

<sup>192</sup> Amendments and endorsements, including rate increases and rate reductions, were filed throughout the period 1966 to 1983. CX 26A-CX 28C, CX 33A-CX 34G; RX 148, RX 152-RX 152A, RX 153-RX 153A, RX 154-RX 154B, RX 155F, RX 160-RX 164E. Apparently some were carefully reviewed while others were approved with minimal review; there was no showing, however, in the record that even this minimal review was inadequate considering the subject matter of these minor ancillary filings. See Ferraro 2324-25, DiSanto 2757-69, 2772, 2779-80, 2786-87, Bell 2835-39, 2844-45.

<sup>193</sup> See DiSanto 2729; CX 25A-H; RX 104-RX 111C.

<sup>194</sup> RX 104.

<sup>195</sup> RX 105-RX 111C.

<sup>196</sup> See Ferraro 2334-35; RX 105-RX 111C.

schedule contained both a risk rate (i.e., the so-called "Approved Attorney Plan") and an all-inclusive rate setting the charges for risk as well as search and examination.<sup>197</sup>

131. The only other major rate filing of the Connecticut Rating Bureau was made on December 3, 1981. It contained a 20 percent increase in both the approved attorney (risk) rate, as well as the inclusive rate covering risk charges and search and examination fees.<sup>198</sup>

132. In support of the 1981 rate increase, the Connecticut Rating Bureau submitted a profitability analysis by Arthur D. Little showing that on the basis of statistical reports received from the members the proposed increase would produce a projected 2.78 percent return on capital.<sup>199</sup> While Dr. Plotkin of Arthur D. Little defended the use of profitability data in connection with the rate submissions of the Connecticut Rating Bureau and other bureaus, he acknowledged that these reports were not intended for the purpose of ascertaining the reasonableness or propriety of insurer expenses.<sup>200</sup> He further conceded that a test of state supervision is whether the state examines the extent to which unreasonable insurer expenses are contributing to the burden borne by the insurance buying public.<sup>201</sup> In Plotkin's view, one expense in particular—excessive commissions paid to agents (i.e., "agents'

<sup>197</sup> CX 25A-H.

<sup>198</sup> DiSanto 2736, Bell 2826; CX 30A to Z-98. On September 30, 1983, the Connecticut Rating Bureau filed an amended manual eliminating the inclusive rate entirely, and in addition making minor adjustments in rates (see Finding 104 and DiSanto 2748-49, Bell 2834; CX 32A-X).

<sup>199</sup> CX 30A to Z-98; RX 102 to Z-126.

<sup>200</sup> Plotkin 2650-51, 2704-09.

<sup>201</sup> Plotkin 2650-51, 2683-84, 2698-99, 2707-09. See also Ferraro 2355-56.

retention," see Finding 44)—tends to drive up the cost of title insurance while dangerously shrinking insurance company profits.<sup>202</sup>

133. In order to show that the December 1981 increase (and its accompanying justification) were carefully reviewed by the Connecticut Insurance Department, respondents called Waldo R. DiSanto, Chief of the department's Property and Casualty Division. DiSanto testified that his discussions with the Connecticut Rating Bureau

... centered around the expense component in the rates, more specifically the, in my terms, the disproportionate allowance for commissions paid in connection with title insurance.<sup>203</sup>

DiSanto further testified that in his view the agent's commission component of title insurer expenses was "very high,"<sup>204</sup> that it was the main problem area in title insurance,<sup>205</sup> and that it was driving the cost of title insurance up.<sup>206</sup> But having identified this crucial aspect of rate making, DiSanto immediately conceded that he was powerless to do anything about it. He testified as follows:

Q. Did you address with the people with whom you met at this time possible methods of trying to control what you perceived to be these excessive commissions?

A. Yes, commissions, in my view, commissions in the title insurance system have kind of become a sour point, if I can describe it that way, and it has been

<sup>202</sup> Plotkin 2684, 2706-09.

<sup>203</sup> DiSanto 2737. See also DiSanto 2756; RX 114-114A.

<sup>204</sup> DiSanto 2738.

<sup>205</sup> DiSanto 2797.

<sup>206</sup> DiSanto 2738.



kind of a constant item for discussion when I meet with or when I had met with title insurance people, the rating organization member representatives.

And I had discussed alternative ideas to reflect or to limit a more appropriate, in my view more appropriate, commission expense.

Q. Were you ever successful in trying to achieve this goal?

A. I guess not because the commissions are still about where they were.

Q. Is there any reason why you have not been able at this point to address this problem?

A. Yes. The function of the Insurance Department, the Insurance Commissioners Office, in connection with the review of rates is to require that the components in the rate making structure submitted by either an insurance company or by a rating organization on behalf of companies is, in fact, valid and supported and accurate.

However, our statutes do not provide the authority of the Insurance Commissioner to establish the amount or a minimum or maximum expense. It is only that if in the filing the companies or bureaus say the commission or company expenses or taxes are percent A, B and C, that they must specifically support that and they must be accurate, but the Commission does not have the authority to say it must be limited to a certain amount.

Now, in the commission area the discussions and the alternative suggestions, in my view, would have required statutory changes, which is not within the function of the Insurance Department or my division. We can suggest, well, that is all we could do.

So that was one of the alternatives of me doing it from that standpoint.

In balance, the commissions in those days are pretty much still in effect. So I guess we have not been successful in changing them.

Q. And just to follow up on that, is this a matter that you have made an effort to address in the course of your regulatory scrutiny of the title insurance industry?

A. Yes, sir.<sup>207</sup>

And at Tr. 2809, DiSanto added —

JUDGE NEEDELMAN: Tell me whether this is a fair conclusion or not. You have recognized the importance in rate making of the commission paid by the insurer to the agent, correct?

THE WITNESS: Yes.

JUDGE NEEDELMAN: But Connecticut in no way regulates the commission arrangement between the insurer and the agent?

THE WITNESS: That is correct. It is my understanding, with the exception of a few states that have different arrangements, that this commission is not dissimilar from that paid in other states.

In fact, I believe in some states it may be higher.<sup>208</sup>

134. DiSanto approved the December 1981 filing on January 15, 1982.<sup>209</sup>

135. By the beginning of 1985, all respondents were no longer active in the Connecticut Rating Bureau.<sup>210</sup>

<sup>207</sup> DiSanto 2738-41.

<sup>208</sup> DiSanto 2809. See also DiSanto 2793, 2802-03; CX 156Z-7.

<sup>209</sup> RX 113.

<sup>210</sup> Ferraro 2301, DiSanto 2727-28.

## Wisconsin

136. The Wisconsin title insurance rating bureau (The Wisconsin Title Insurance Rate Service Organization, hereinafter "Wisconsin Rating Bureau"), was authorized under the state's insurance law to establish a joint rate schedule for its members after receiving a license from the Commissioner of Insurance in 1969.<sup>211</sup>

137. The Wisconsin Rating Bureau was subject to a wide array of latent powers possessed by the insurance commissioner, but there is little evidence that these powers were used to influence bureau rate making. To illustrate, while the insurance commissioner was required to examine the Wisconsin Rating Bureau at regular intervals, no examination was ever made. Similarly, while the Wisconsin insurance statute gives the commissioner the authority to reject rates established by the bureau through a process of hearings, no hearing has ever been held in Wisconsin on *any* insurance rate filing, and no rate suspension order has ever been issued.<sup>212</sup>

<sup>211</sup> Donohoe 1614; JXA, pp. 243, 253, 257-59; CX 107; RX 293-RX 295.

<sup>212</sup> Donohoe 1652-53, 1666; Wirtz 1779, 1784-85; JXA, pp. 254, 275-76, 279-80, 296-97. Hearings are only required if a rate is disapproved. JXA, p. 254. The burden of proof in such a hearing is on the insurance commissioner, and considering the limited resources of the insurance department, it is doubtful that he could prevail. According to an official of the state insurance department "[t]he statute was set up, the staffers in the office believe, this way to keep the commissioner and the department from interfering with the rate setting mechanism except in very unusual situations."-Wirtz 1786. There is no requirement under Wisconsin law that each insurance rate filing be subject to public notice, comment, and hearing, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.

138. Rate filings by the Wisconsin Rating Bureau were made under a "use and file" system. This system allows rates to become effective on a date determined by the insurers so long as the rates and any supporting data were filed with the insurance commissioner and made public within 30 days after the effective date. In actual practice, however, the members of the Wisconsin Rating Bureau filed their rate manuals in advance of the effective date, and did not implement major new rate changes until after they were formally stamped as approved by the commissioner's office.<sup>213</sup>

139. The "use and file" approach of Wisconsin reflects a state policy of not interfering with private rate setting on the assumption that market competition would largely determine rates.<sup>214</sup>

140. By authorizing rating bureaus, however, Wisconsin further assumes that since there has been a departure from its basic policy of relying on competition amongst insurers, the rate making process will be closely reviewed.<sup>215</sup>

141. The standard for review of title insurance rates in Wisconsin is that rates should not be excessive, inadequate, or unfairly discriminatory.<sup>216</sup>

142. The Wisconsin Rating Bureau made major rate filings in 1971, 1981, and 1982.<sup>217</sup> In response to the 1971

<sup>213</sup> Donohoe 1621-22, 1652, Wirtz 1749-50; JXA, p. 251; RX 301.

<sup>214</sup> Donohoe 1666, Wirtz 1785-86, 1805-06.

<sup>215</sup> Wirtz 1806-08. See also CX 293C and JXA, p. 243 (i.e., it is Wisconsin policy "to regulate such cooperation in order to prevent practices that tend to bring about monopoly or to lessen or destroy competition").

<sup>216</sup> JXA, p. 246.

<sup>217</sup> In addition, throughout the period 1971-1984, amendments, forms, revisions, compilations, and endorsements were filed by the Wisconsin Rating Bureau. CX 111A to CX 114Z-25, CX 120A-



filing, the Office of the Commissioner raised some questions about the bureau's reasons for limiting search and examination charges to the southeastern counties of the state only. The issue was eventually resolved by the publication of state-wide search and examination charges. The 1971 rates, which represented historical rates charged before the formation of the bureau were, approved although supporting justification was not provided until 1978.<sup>218</sup>

143. Between the 1971 and the 1981 filing (and continuing to 1984), the Wisconsin Rating Bureau retained Arthur D. Little to draw up a statistical reporting system and income and expense plans to be used in justification of rates. The use of these plans is contemplated by the Wisconsin insurance statute which requires the Commissioner to promulgate reasonable rules for reporting loss and expense experience and authorizes the use of a rating bureau to assist the Commissioner in compiling these data.<sup>219</sup> The

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CX 121D, CX 125A-CX 126E; RX 312-RX 315, RX 342-RX 344S, RX 356-RX 356A, RX 359-RX 359B, RX 363-RX 363C, RX 372, RX 373-RX 373D, RX 380-RX 380C, RX 384. The rate adjustments accompanying these filings were neither supported by justifications nor for the most part were they closely reviewed; in fact, the insurance department believed that the rating bureau may have pulled the rates "out of the air." Wirtz 1793. See also Donohoe 1661, Wirtz 1759-62, 1768-69, 1771-76, 1802-03, 1807-08.

<sup>218</sup> Donohoe 1618-27, 1657-59, Wirtz 1764, 1796, 1810-11; CX 110A-G; RX 348 to 348Z-81. The original geographical limitation reflected the fact that branches of the title insurers were concentrated in the Milwaukee area. In the remainder of the state, approved attorneys (whose search and examination charges were not regulated) were the predominant providers of search and examination services. See CX 262"T".

<sup>219</sup> Donohoe 1627-33, Grabski 1689-90, Wirtz 1763-65, Plotkin 2574-98; JXA, p. 260; RX 334 to RX 334Z-19, RX 348 to RX 348Z-81, RX 351, RX 353 to RX 353Z-13, RX 355, RX 361 to RX

Arthur D. Little materials, however, were never intended to be used for determining the reasonableness or propriety of the insurers' reported expenses.<sup>220</sup>

144. The 1981 filing represented a substantial increase (11 percent) in title insurance rates including the rate for search and examination. While the filing and supporting Arthur D. Little data were checked for accuracy before the rate was allowed to go into effect (i.e., not disapproved), the Office of the Commissioner of Insurance made no inquiry into insurer expenses, notwithstanding recognition by the state office that title rates cannot be effectively regulated without such a scrutiny.<sup>221</sup> A key official of the state's Office of the Commissioner of Insurance testified as follows:

Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?

A. No.

Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?

A. Yes.<sup>222</sup>

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361Z-12, RX 370 to RX 370Z-17, RX 375 to RX 375U, RX 383 to RX 383Z-21, RX 496 to RX 496Z-23, RX 498 to RX 498Z-32. Arthur D. Little also represented the Wisconsin Rating Bureau in successfully opposing statutory revisions requiring specific justification data for each rate change and setting maximum search and examination fees. Donohoe 1634-40, 1653, Plotkin 2585-87; RX 320-RX 326A.

<sup>220</sup> Plotkin 2650-51, 2704-07. See also RX 336A.

<sup>221</sup> Wirtz 1750-57, 1776-83.

<sup>222</sup> Wirtz 1778-79. See also Wirtz 1777-78, 1826. See also Plotkin 2577-78 for evidence that Wisconsin insurance officials have acknowledged that excessive insurer expenses is a major concern.

The same official made the following over-all assessment of title insurance supervision in Wisconsin —

Q. Now, for the most part, the people in the insurance department are not concerned with title insurance, is that right?

A. It was not a major line of insurance that we devoted a lot of staff discussion to.<sup>223</sup>

145. Another rate increase (again including the charge for search and examination) was filed by the Wisconsin Rating Bureau in October 1982. The Office of the Commissioner gave this filing a cursory reading to the point that the supporting materials (statistical data and a pro forma analysis) were not even checked for accuracy before the rate increase was accepted.<sup>224</sup>

146. The Wisconsin Rating Bureau was dissolved, effective December 31, 1984.<sup>225</sup>

#### Arizona

147. The Arizona title insurance rating bureau (Title Insurance Rating Bureau of Arizona, hereinafter "Arizona Rating Bureau") was authorized under the state's insurance statute to establish joint rates for its members after being licensed in 1968 by the director of the Department of Insurance.<sup>226</sup>

148. The Arizona Rating Bureau was subject to a wide range of latent powers possessed by the state's insurance director including the power to audit the bureau's records

<sup>223</sup> Wirtz 1782. See also Wirtz 1790-91.

<sup>224</sup> Wirtz 1775-76, 1816-17, 1823-24, Plotkin 2600-05; CX 123A to CX 124Z-25; RX 374-RX 378.

<sup>225</sup> RX 385.

<sup>226</sup> Wilkie 2107-08; JXA, pp. 87, 91-92, 94, 101-10; CX 2-CX 5 "T"; RX 48-RX 50A.

and revoke its license, and broad authority to hold public hearings, promulgate rules, and issue orders discontinuing bureau practices found to be inconsistent with the insurance statute.<sup>227</sup> That actual use of these powers, however, is more hypothetical than real as shown by the fact that during the entire period 1968 to 1981 the insurance department conducted no examination of the Arizona Rating Bureau although there is a statutory requirement for such an examination at least once every five years.<sup>228</sup>

149. The rate filings of the Arizona Rating Bureau were made pursuant to the "file and use" approach. Under this approach, the rating bureau filed rates and its members waited 15 days before using them. If no action was taken by the director during the 15 day waiting period, the rates were deemed approved under a "deemer" provision. Notwithstanding the "file and use" system, in actual practice the Arizona Rating Bureau's rate submissions were not put into effect until actually stamped "approved" by the director.<sup>229</sup>

<sup>227</sup> JXA, pp. 93-110.

<sup>228</sup> Bethel 1992-93, Wilkie 2109; JXA, p. 109; RX 93A. No public hearing was ever held in Arizona on joint rates filed by the Arizona Rating Bureau.

<sup>229</sup> Wilkie 2108, Barberich 2228-30, 2265; JXA, p. 92. If a rate filing was disapproved, a hearing had to be held. JXA, p. 93. A hearing could also be held at the request of a third party who objected to a rate filing. In actual practice, however, no rate filing of the Arizona Rating Bureau was disapproved, and no hearings on title insurance rates filed by the Arizona Rating Bureau was ever held. Wilkie 2128-29. Hearings were held on allegations that insurers or their agents had given illegal inducements to realtors in order to obtain business. RX 45-RX 47H. There is no requirement under Arizona law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.



150. The general statutory standard for rate scrutiny in Arizona is that rates should not be inadequate, excessive, or unfairly discriminatory.<sup>230</sup> In reviewing rates, the Department of Insurance is broadly directed to give due consideration to maintaining the stability of rate structures, assuring the financial solvency of title insurers during periods of economic depression, and attracting capital to the title insurance business.<sup>231</sup>

151. The Arizona insurance statute also mandates that rate filings should be accompanied by adequate justification, and the Director of the Insurance Department, with the assistance of the rating bureau, is required to promulgate rules relating to statistical plans for use by the rating bureau in reporting the expense experience of its members as justification for rate increases.<sup>232</sup>

152. Against the background of the statutory scheme outlined in Findings 147-151, and putting aside minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980,<sup>233</sup> the Arizona Rating

<sup>230</sup> JXA, p. 91. In addition, the Arizona code elaborates on this broad statutory standard by providing that due consideration should be given to rate stability, encouraging growth in assets of insurers during periods of high business activity, providing for financial insolvency in periods of depression, and the desirability of paying dividends to induce capital investment. JXA, p. 91.

<sup>231</sup> JXA, p. 91.

<sup>232</sup> JXA, pp. 92-94.

<sup>233</sup> CX 10A-CX 18"O". There is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject. See Wilkie 2118-20; Barberich 2230-31, 2264-66. A 1968 rating filing by the Arizona Rating Bureau, which remained the basic title insurance rates throughout the period 1968 to 1983, apparently represented the rates charged by some bureau members before the bureau was formed, but these rates had not been filed with the Depart-

Bureau seemed to spend most of its time between 1977 and 1983 responding to a change in the insurance law that added settlement or escrow rates to the title insurance schedule.<sup>234</sup> During this period, several rate consultants, including Arthur D. Little, put together financial reporting and statistical plans mainly intended to show that the bureau's collectively established escrow rates did not produce excess profits.<sup>235</sup> These efforts culminated in a September 18, 1980 submission from Arthur D. Little containing a detailed analysis of the economic performance of the title insurance industry from 1972 to 1979, and designed to show that title insurance and escrow rates were not excessive.<sup>236</sup> Following this submission, the Department of Insurance announced on November 3, 1980, that an investigation of the Arizona Rating Bureau would be conducted along the following lines:

- 1) An examination of the rate-making procedures and methodology used by the [Arizona Rating Bureau] with respect to the development of title insurance and escrow rates for use in Arizona;
- 2) a determination as to whether the title insurance and escrow rates as filed by [Arizona Rating Bureau] are reasonable and not excessive, inadequate or unfairly discriminatory;

ment of Insurance prior to 1968. Bethel 1968, 1971, Wilkie 2074-77, 2107, 2112-13, Barberich 2289; CX 8A to Z-12; RX 60A. While the 1968 rate filing brought an inquiry from the Department of Insurance as to how the "risk" component of the filed inclusive rate was derived (Wilkie 2080, 2087-88; RX 69A), there is no convincing evidence that the rate was either justified by the bureau or reviewed by the state. See Wilkie 2113-14, Barberich 2263-64, 2289; RX 60A.

<sup>234</sup> Wilkie 2091-96, 2121-23, Barberich 2243-44; RX 63-RX 63Z, RX 83-RX 83G.

<sup>235</sup> Wilkie 2092-99, 2121-26, Plotkin 2607-16; CX 9A to Z-52; RX 63-RX 63Z, RX 67-RX 67E, RX 91 to RX 92Z-16, RX 493 to RX 493Z-17.

<sup>236</sup> Plotkin 2617; RX 92 to Z-16.

- 3) An analysis of the methodology used for measuring the profitability of title insurers and their agencies, including an analysis of the Arthur D. Little statistical plan which has been filed on behalf of [Arizona Rating Bureau];
- 4) an evaluation of the extent to which there is competition among title insurers doing business in Arizona; and
- 5) the identification of areas which the rate-making methodology, including any statistical plan, together with the level of competitive activity among insurers might be improved.<sup>237</sup>

The Arizona Rating Bureau was also informed that—

... the Department has not, as yet, approved the statistical plan prepared and filed on behalf of [Arizona Rating Bureau] by Arthur D. Little. Hopefully, this examination will provide the Department with the necessary evaluation of this statistical plan so that the plan can be approved or modified as our needs require.<sup>238</sup>

153. Before the Arizona investigation could be completed,<sup>239</sup> however, a federal civil complaint challenging the propriety of the joint fixing of escrow rates by the Arizona Rating Bureau was filed by the United States, followed shortly by a *parens patriae* federal suit brought by

<sup>237</sup> RX 93-RX 93A.

<sup>238</sup> RX 93A-RX 93B.

<sup>239</sup> The Arizona Insurance Department investigation apparently did not get much beyond retaining an actuarial consulting firm, Tillinghast, Nelson and Warren, to review the Arthur D. Little material. The Tillinghast firm agreed with Arthur D. Little's conclusion that the rates were not excessive. Bethel 1975, Barberich 2251, 2270, 2281, 2289; RX 93-RX 93B, RX 96 to RX 96Z-1.

Arizona.<sup>240</sup> After the entry of a final judgment in the Department of Justice's case on December 16, 1981, the Arizona Rating Bureau went out of business for *all* purposes (i.e., the fixing of title, search and examination, and escrow rates), and its corporate charter was revoked on October 1, 1983.<sup>241</sup>

#### Ohio

154. The Ohio Title Insurance Rating Bureau (hereinafter "Ohio Rating Bureau") was authorized to file a joint rate manual for its members after being licensed by the Ohio Department of Insurance in 1972.<sup>242</sup>

155. The practices of the Ohio Rating Bureau, including rate making, were subject to a wide array of latent powers possessed by the insurance superintendent including the right to review rates, conduct audits, hold public hearings, suspend or revoke the bureau's license, promulgate statistical plans, and issue orders directed at practices that were unfair, unreasonable, or inconsistent with the insurance statute.<sup>243</sup>

156. The rate filings of the Ohio Rating Bureau were made pursuant to the "file and use" approach—after a 15 day waiting period, which could be extended for an addi-

<sup>240</sup> Wilkie 2102-06; RX 97"T", RX 98C.

<sup>241</sup> Wilkie 2106; RX 99.

<sup>242</sup> Smith 2961-62; JXA, pp. 219-20; RX 233.

<sup>243</sup> JXA, pp. 218-25. That at least some of these powers are purely latent is shown by the fact that no audit was ever conducted by the Department of Insurance although the statute requires an audit at least once every five years. Smith 3033. There is no requirement under Ohio law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with each rate filing.



tional 15 days, the rate became effective unless it was disapproved by the Superintendent of Insurance.<sup>244</sup>

157. The general statutory standard for rate review in Ohio is that rates shall not be excessive, inadequate, or unfairly discriminatory. In considering whether this standard has been met, the insurance superintendent is directed to consider "[p]ast and prospective loss experience," a "reasonable margin for underwriting profit and contingencies," dividends, past and prospective expenses, and "all other relevant factors."<sup>245</sup>

158. Between 1972 and 1983, all rates filed by the Ohio Rating Bureau covered "risk" only. None of these filings purported to contain charges for search and examination services or settlement services.<sup>246</sup>

<sup>244</sup> JXA, pp. 218-19; Ratchford 3101-02. Rate filings are only made public after the effective date. Ratchford 3087. While the Ohio statute does not require explicit prior approval of rates (see § 3935.04(D), Ohio Revised Code, JXA, p. 218), in practice the state apparently has acted under the assumption that prior approval is required. Compare Ising 3050 with Ising 3061. See also Ratchford 3101-02.

<sup>245</sup> JXA, p. 217.

<sup>246</sup> Smith 2966, 3036; CX 75F, CX 84F, CX 101F, CX 238G. Major rate filings were made in 1972, 1978 and 1981. Soon after the 1972 filing, the Ohio Rating Bureau retained Dr. Irving Plotkin of Arthur D. Little to draw up statistical and financial plans intended, essentially, to show profit calculated on the basis of a return on total capital invested. Plotkin also did pro forma analyses of rate increases filed by the bureau. Plotkin testified that although he was compensated by the Ohio Rating Bureau for the work done on these rate matters, he was actually in an adversary position in dealing with the bureau since for all practical purposes he was taking his direction from a Department of Insurance which was hostile to the bureau. Plotkin 2508-10, 2511-13. Plotkin's perception of an adversary relationship is not shared by his sponsors. A few months prior to the September 17, 1981, Ohio filing, an officer of respondent Lawyers Title expressed

159. The Ohio Department of Insurance considered all filings of the Ohio Rating Bureau as covering risk only, and as specifically not including charges for search and examination and settlement services.<sup>247</sup>

160. Respondents independently set and published charges for search and examination services and settlement services. These charges were not submitted for review to the Ohio Department of Insurance.<sup>248</sup>

161. Complaint counsel's entire case on the search and examination issue in Ohio rests on the supposition that because rates were justified on the basis of rate of return

the following thoughts about Arthur D. Little's role in Ohio rate making:

While Lawyers Title is certainly not the only company in Ohio, I wonder if we would not find that many other companies would not feel similarly about the suggested rate increases. Before asking Arthur D. Little to massage these suggested revisions, I suggest that we try to determine if the suggestions would be palatable to the majority of [Ohio Rating Bureau] members. CX 335. See also CX 330A in which Dr. Plotkin is described by the Ohio Department of Insurance as an "advocate" of the Wisconsin Rating Bureau.

While the principal rate filings and supporting papers of the Ohio Rating Bureau, including the Arthur D. Little submissions, were reviewed by the insurance department (Smith 2963, 2986-90; CX 93A; RX 235-RX 235B, RX 239-RX 239A, RX 241-RX 241B, RX 249-RX 249B, RX 276, RX 277), the record indicates that these rates were approved notwithstanding reservations within the department about the adequacy of the justification, especially the use of the rate of return on total capital as a basis for rate making. Smith 3015; CX 330A-B, CX 331. A minor endorsement filed in 1979 was rejected because it lacked justification (RX 259-RX 260) but other amendments and endorsements, which were filed during the period 1980 to 1983, apparently were approved with little or no accompanying justification. Smith 3030-31; CX 97A, CX 99A.

<sup>247</sup> Ising 3060; RX 289. See also RX 290-RX 290B.

<sup>248</sup> Malaker 825-26, Sinkhorn 900, Smith 3036-37.

on total capital they must of necessity be inflated to include such non-risk elements as the cost of conducting a search and examination and settlement.<sup>249</sup> While the record indicates that Ohio risk rates may be higher than risk rates elsewhere,<sup>250</sup> there is no evidence to support the complaint allegation that respondents have used the rating bureau to establish uniform charges for search and examination and settlement services.

162. Respondents are no longer members of the Ohio Rating Bureau.<sup>251</sup>

#### Idaho

163. The establishment in 1974 of the Idaho title insurance rating bureau (Idaho Title Insurance Service Organization, Inc., hereinafter "Idaho Rating Bureau") as a medium for establishing joint rates, was authorized by the Idaho insurance statute which requires that a title insurance rating bureau obtain a license from the Director of the Department of Insurance, and that it have as its members at least six title insurers who together account for 50 percent of the title insurance premiums written in the state. The license was granted after a hearing before the insurance department.<sup>252</sup>

<sup>249</sup> See CX 91A to Z-154. Neither side in this litigation pressed the argument that rates in rating bureau states are higher or lower than rates elsewhere, or that states which actively supervise rating bureaus have lower or higher rates than states which have little supervision. As far as this record will allow, comparisons cannot be made because the cost of conducting the search and examination differs from state to state. See Bethel 1914-15.

<sup>250</sup> See CX 171. The record also indicates that on some occasions an insurance company agent will not charge a large customer for search and examination. Waiwood 1109.

<sup>251</sup> Smith 3033.

<sup>252</sup> JXA, pp. 184-85; CX 46A-CX 49A.

164. The Idaho Rating Bureau was subject to inspections by the Department of Insurance, and on three occasions the department made an audit of the financial records of the bureau.<sup>253</sup> Other latent powers of the department included the authority to revoke the bureau's license, to issue orders condemning practices that were inconsistent with the insurance statute, and to hold hearings on rates. Hearings, which are only required when a rate is disapproved, were not held on any of the bureau's rate filings.<sup>254</sup>

165. The joint rate filings of the Idaho Rating Bureau were made pursuant to Section 41-2706 of the *Idaho Code* which requires a 30 day waiting period and the affirmative prior approval of the Director of the Department of Insurance <sup>255</sup> (in contrast to the "file and use" or "use and file" approaches previously noted in Connecticut, Wisconsin, Ohio, Arizona, and Montana).

166. Approval of rates, according to the Idaho insurance statute, is presumably based on a determination by the Director of the Department of Insurance that the proposed rates are not excessive, inadequate, or unfairly discriminatory. The statute further provides that in reviewing title insurance rates the director should take into

<sup>253</sup> Mitchell 2907, Fraundorf 3444-45; JXA, pp. 168-70, 175-76, 180, 184-86, 188; RX 194 to RX 195Z-15, RX 201-RX 202, RX 204-RX 204A, RX 206-206N, RX 224-RX 224S. After its 1976 examination, the insurance department required the Idaho Rating Bureau to take steps to resolve an apparent conflict of interest between the official duties of one of the bureau's officers and the officer's outside insurance business. RX 196-RX 200.

<sup>254</sup> Mitchell 2922, 2939; JXA, pp. 173-74, 180-81. There is no requirement under Idaho law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with each filing.

<sup>255</sup> Fraundorf 3446; JXA, pp. 180-82.



account the state's policy of maintaining stability in insurance rate structures, the necessity for protecting the financial solvency of title insurers and their agents in periods of economic depression by encouraging growth in periods of business expansion, and the desirability of inducing capital to be invested in the industry by assuring a reasonable margin of underwriting profit.<sup>256</sup>

167. The Idaho insurance statute further provides that all title insurance rate must be justified but insurers are given wide latitude as to the form of the justification—i.e., experience, judgment, statistical data, the experience of other insurers or rating bureaus, and any other factors deemed relevant.<sup>257</sup>

168. Under the statutory scheme outlined in Findings 163-167, the Idaho Rating Bureau filed its first major rate proposal on October 3, 1975. Consideration of this filing was suspended as the Department of Insurance convened a public hearing to consider its Amended Regulation No. 25, which related to the use of inclusive rates and a variety of other matters—minimum rates, reissue rates, cancellation fees, the application of the basic rate schedule to special situations, and the amount of insurance that could be purchased in a particular transaction. Following promulgation of Amended Regulation No. 25, the Idaho Rating Bureau refiled its manual and justification (including agent income tax returns) which the Department held open for public inspection for 30 days. During that time, the rate was referred to the department's outside title insurance consultant. The consultant provided his analysis, and on January 20, 1976, the department approved the filing, effective March 1, 1976.<sup>258</sup>

<sup>256</sup> JXA, p. 181.

<sup>257</sup> JXA, p. 181.

<sup>258</sup> Mitchell 2883-91; CX 56A-58S; RX 167-RX 182V.

169. The Idaho Rating Bureau filed its only other across-the-board rate increase with the Department of Insurance on December 15, 1980. After subpoenaing data from the members relating to insurer expenses, and on the recommendation of a retained consultant, the department approved the manual effective February 16, 1981, contingent upon the receipt of still additional material from two insurers explaining large increases in expenses in 1978.<sup>259</sup>

170. There is no convincing evidence that the Idaho Insurance Department has failed to consider any insurer expense which might impact on rates, including agent retention expense.<sup>260</sup>

171. The Idaho Rating Bureau was dissolved, effective November 29, 1984.<sup>261</sup>

#### Montana

172. The Montana title insurance rating bureau (The Montana Title Insurance Service Organization, Inc., hereinafter "Montana Rating Bureau") was authorized to establish joint rates for its members after being licensed by the Commissioner of Insurance on July 19, 1982.<sup>262</sup>

173. Under Montana insurance law, the activity of a rating bureau, including joint rate making, is subject to the latent power of the insurance commissioner to inspect

<sup>259</sup> Mitchell 2891-98; RX 183-RX 193. Miscellaneous rate adjustments, forms, and endorsements were filed and approved throughout the period 1974-1984 with apparently little or no review by the insurance department. Mitchell 2925-39, Fraundorf 3434-42; CX 62A-71B; RX 207-RX 223.

<sup>260</sup> See Mitchell 2941-51, Fraundorf 3447-48, 3451-53.

<sup>261</sup> Mitchell 2907-08; RX 203-RX 205.

<sup>262</sup> Statton 2855-57; JXA, pp. 196-97, 200-06; CX 36-CX 40G.

the bureau and if warranted revoke its license, hold hearings on rating bureau practices, and issue orders requiring compliance with the insurance statute.<sup>263</sup>

174. The Montana Rating Bureau filed its jointly fixed rates under a "file and use" system whereby rates for title insurance become effective as soon as they are filed with the Department of Insurance.<sup>264</sup>

175. The statutory standard for reviewing title insurance rates in Montana is that the rates should not be excessive, inadequate or unfairly discriminatory.<sup>265</sup> The Montana insurance statute further provides that title insurance rate filings must contain supporting data, and the insurance department is directed, with the aid of the rating bureau, to promulgate statistical plans that could be used to determine whether rates met the statutory standards.<sup>266</sup>

176. Under the statutory scheme outlined in Findings 172-175, the Montana Rating Bureau made its only major rate filing, which included charges for search and examination, on February 22, 1983. Citing as justification for an increase, nationwide loss figures, a decline in

<sup>263</sup> JXA, pp. 196-97, 200-02, 210-12. In practice, Montana held no hearings respecting title insurance rates filed by the Montana Rating Bureau. Statton 2869. There is no requirement under Montana law that insurance rate filings must be subject to public notice, comment, and hearings, or that a written decision, appealable to the state courts, be issued with respect to each rate filing.

<sup>264</sup> Statton 2864; JXA, p. 200; CX 343B.

<sup>265</sup> JXA, pp. 199, 208-09. The broad statutory language is further refined by definitions of excessive ("unreasonably high for the insurance provided under circumstances where a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable"), and inadequate ("unreasonably low for the insurance provided such that the continued use of such rate either endangers the solvency of the insurer using the same or . . . the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly"). JXA, p. 199.

<sup>266</sup> JXA, pp. 200, 208-09.

operating profits, and reduced home sales, the bureau's filing included a commitment to gather statistical data and undertake a profitability study for all underwriters and agents in Montana during the year 1984 in order to provide further support for the rate.<sup>267</sup>

177. In connection with the February 22, 1983 filing, a representative of the Montana Rating Bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past five years. There is no evidence that this material was ever provided.<sup>268</sup>

178.- As far as this record will allow, Montana insurance officials examined agent retention expenses both before and after the creation of the Montana Rating Bureau, and there is no evidence that the state's method of dealing with the problem, i.e., by giving the insurance commissioner specific authority to disapprove excessive fees, has been ineffectual.<sup>269</sup>

<sup>267</sup> Statton 2857-60; CX 41A-W. An October 14, 1984 filing of the Montana Rating Bureau was basically a clarification of the 1983 filing plus an increase in the charges for special endorsements. Statton 2860-63; CX 43A-CX 44E. By the time this filing went into effect on January 2, 1985, respondents had largely withdrawn from the rating bureau. Statton 2856-57, 2862-63; CX 45; RX 225-RX 226, RX 228-RX 230.

<sup>268</sup> Statton 2862, 2865-68; CX 41A-W, CX 343A-D; RX 227.

<sup>269</sup> Plotkin 2691, 2714-17. Section 33-25-302 of the Montana Title Insurance Act of 1985 provides as follows:

**33-25-302. Disapproval of agency contracts.** (1) The commissioner may disapprove a title agency contract between a title agent and title insurer, upon appropriate notice to the parties to the contract, if he finds that the contract, together with all amendments and related documents:

(a) does not provide for adequate monitoring of the agent's financial transactions; or



179. Between July 1, 1983, and January 22, 1985, respondents resigned from the Montana Rating Bureau.<sup>270</sup>

# I. SETTLEMENT OR ESCROW SERVICE

180. Settlement services, sometimes referred to as closing or escrow services, embrace the ministerial functions of carrying out the parties' instructions respecting the execution, delivery, and recording of the deed and mortgage and payment of purchase money. The settlement clerk (also known as an "escrow officer" or simply a "closer") may also be called on to pay taxes and fees and he may assist in the calculation or adjustment of prorated items such as utility charges.<sup>271</sup>

181. While the settlement date usually coincides with the date of issuance of the final title policy (the insurer having directed a "bring down" or "mini" record search and examination between the date of the binder and the date of the settlement in order to be certain that no new title defects have surfaced), there is no evidence that this minor extension of the search and examination process

(b) provides for inadequate, unreasonable, or excessive amounts to be paid to or retained by the title agent. Factors the commissioner may consider in this determination include but are not limited to the agent's duties under the contract and the general level of amounts paid to or retained by other title agents in the state performing or assuming comparable duties.

(2) No person may act as a title agent under an agency contract that has been disapproved by the commissioner.

Section 33-25-302 is patterned after the NAIC Model Title Insurance Act. See RX 502Z-114.

<sup>270</sup> RX 225-RX 230.

<sup>271</sup> Fromhold 956-58, Waiwood 1047, Armstrong 1162-63; CX 155D, CX 196Z-60 to Z-65, CX 238F-H, CX 244Z-52 to Z-62, CX 305; RX 409L, T, RX 421E, RX 427Z-135, RX 431Z-116 to Z-118. Depending on local customs, settlement may be done by mail ("escrow closing") or by the parties meeting and exchanging documents ("table closing"). Waiwood 1096, Everbach 1357-59.

somehow transforms the ministerial functions of settlement or escrow into the business of insurance.<sup>272</sup>

182. Respondents also claim that the settlement process functions to disclose title defects that do not appear on the public records. For example, the closing officer in reviewing the papers may uncover additional encumbrances on the property, or the closing officer also may require identification of the parties, a procedure which could disclose an attempted forgery. In addition, the closing officer reviews affidavits or other documents upon which the insurer will rely to remove what otherwise would be listed as "exceptions" on Schedule B of the title insurance policy.<sup>273</sup> There is no evidence, however, that these functions need be carried out by title insurers. As far as this record will allow, all aspects of settlement or escrow are adequately performed by real estate brokers, attorneys, banks, independent escrow companies, and title insurers, all of whom aggressively compete for settlement business on the grounds that each is more expert than the others in performing the clerical duties constituting settlement or escrow.<sup>274</sup>

183. Settlement is treated by respondent insurers as a discrete service which is ancillary to the title insurance business.<sup>275</sup>

<sup>272</sup> Ippel 657, Malaker 735, Armstrong 1155-56, 1180, Ferraro 1204, Bonita 1278-79, 1284, Everbach 1330-31; CX 196Z-65, CX 222Z-121; RX 389Z-221.

<sup>273</sup> Ippel 654, Sinkhorn 892-97, Fromhold 956-63, Waiwood 1114-16, Armstrong 1162-64, Everbach 1356-61, Bowling 3322-24, 3349-51; CX 196Z-69 to Z-70, CX 222Z-129 to Z-130, CX 244Z-58; RX 399C-D, RX 442H-"T".

<sup>274</sup> See Sinkhorn 899-900, Waiwood 1113-16, Armstrong 1176-77, Everbach 1367, 1372, 1401-02, Bowling 3323, 3350-51, 3370-71; CX 196Z-73, CX 316B.

<sup>275</sup> Everbach 1363; CX 87M, CX 238C, K, CX 293D, CX 310-"T"; RX 263J, RX 327A.

184. The costs which go into making up settlement fees have nothing to do with risk assumption, risk spreading, or any other insurance consideration. These fees are based on such factors as whether the settlement is held in the closer's office or not, how long the closing takes, travel time, highway tolls, the price of gasoline, and parking fees.<sup>276</sup>

185. Complaint counsel have pressed the issue of alleged illegal fixing of settlement services through rating bureaus in five states — Arizona, Connecticut, Ohio, New Jersey and Pennsylvania (see Findings 186-189).

186. While the complaint alleges that the charges for settlement services were fixed in Arizona (and there can be no question that beginning in 1977 the Arizona Rating Bureau set escrow rates collectively),<sup>277</sup> this issue is not properly before the Federal Trade Commission. Settlement or escrow services in Arizona were investigated by federal authorities, and until December 1991 are the subject of a comprehensive judgment as well as the continuing jurisdiction of the United States District Court For The District of Arizona.<sup>278</sup>

187. Complaint counsel argue that the "risk rate" which prevails in Ohio not only includes a hidden search and examination charge, but also an amount representing a jointly set settlement fee. There was a failure of proof on this issue.<sup>279</sup>

188. Complaint counsel argue that both the approved attorney (risk) rates and inclusive rates filed in Connecticut were based in part on escrow expenses. While escrow expenses may have been used to justify rate increases,<sup>280</sup> there is no evidence that respondents charged uniform settlement or escrow fees in Connecticut.

<sup>276</sup> CX 276P; RX 4N, RX 8E, RX 9D, E, RX 10C, RX 11D, RX 13A.

<sup>277</sup> Wilkie 2095, 2122; RX 63-RX 63Z, RX 67-RX 67E.

<sup>278</sup> Civ. 80-769 (Judgment of U.S. District Court For The District of Arizona, December 16, 1981).

<sup>279</sup> See Findings 158-161.

<sup>280</sup> CX 20Z-18 to Z-19.

189. Settlement fees have been included in jointly established rates in Pennsylvania and New Jersey.<sup>281</sup> The only issue, however, in these states is the authorization question under *Parker* as it relates to attorney-agents. This is treated in Findings 117-123.

#### J. MOOTNESS

190. Respondents participated in various state title insurance rating bureaus as follows:

Table 1: Participation by Respondents in Rating Bureaus

State	Respondents (Including First American) Active In Rating Bureau	Active Period of Rating Bureaus
Arizona	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1968 to 1981-82
Connecticut	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1965 to 1985
Idaho	Ticor, Chicago Title, SAFECO, First American, Lawyers Title	1974 to 1984
Montana	Ticor, Chicago Title, SAFECO, First American, Lawyers Title	1982 to 1984-85
Ohio	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1972 to 1984
Wisconsin	Ticor, Chicago Title, SAFECO, Lawyers Title, First American, Stewart	1969 to 1984
Pennsylvania	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1946 to 1983
New Jersey	Ticor, Chicago Title, SAFECO, First American, Lawyers Title, Stewart	1975 to 1983

Sources: Arizona (CX 2, CX 6A, CX 7A, CX 8A; RX 99, RX 472), Connecticut (Ferraro 2300-01, DiSanto 2727-28; CX 23, CX 24, CX 31A-B, RX 102C), Idaho (Mitchell 2907-09); CX 46B, CX 49F, CX 50A, CX 51, CX 55; RX 166-166A, RX 203-203H, RX 205) Montana (Statton 2856-57; CX 40A-B, CX 41H; RX 226, RX 228-230), Ohio (Smith 3033; CX 72A-C, CX 74A-R), Wisconsin (CX 103-CX 109; RX 385), Pennsylvania (CX 128A-128B, CX 134A), New Jersey (CX 277D, CX 279E, CX 280E, 281D, CX 282E, CX 283E, CX 285D)

<sup>280</sup> CX 30Z-18 to Z-19.

<sup>281</sup> Settlement fees were taken out of New Jersey rating bureau schedules as of August 2, 1983. CX 284C. For inclusion of settlement



191. While respondents are not presently members of any state rating bureaus which jointly fix the rate for search and examination or settlement services, there was no testimony from respondents' officers, or any other evidence that respondents have abandoned the notion of forming title insurance rating bureaus in the future.

### III

#### DISCUSSION

Respondents, who rank among the nation's largest title insurers, have at one time or another been members of rating bureaus which establish uniform rates for title search and examination and settlement services. Participation by respondents in these rating bureaus raises two main questions: first, whether joint rate making respecting search and examination and settlement services relates to the "business of insurance," and is therefore exempt from the antitrust laws under the McCarran-Ferguson Act ("McCarran Act"); and second, whether this joint rate making, even if it is not exempt under the McCarran Act, is nevertheless beyond the reach of the federal antitrust laws by reason of the "state action" (*Parker*) doctrine since the rating bureau activities of respondents reflect a policy of the relevant states to suspend competition and are actively supervised by these states.

#### The "Business of Insurance"

In 1945, Congress passed the McCarran Act for the purpose of removing the "business of insurance" from the reach of the federal antitrust laws to the extent that it is regulated by state law.<sup>282</sup> The act was passed in response

fees prior to 1983 see CX 277Z-3 to Z-5. Settlement fees were included on rates filed by the Pennsylvania Rating Bureau as of June 1, 1984. CX 136A-B.

<sup>282</sup> The complaint makes no charge that the subject rating bureaus were not "regulated" by state law within the meaning of the McCarran

to *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944) which held that insurance transactions were subject to federal regulation under the Commerce clause, and that the antitrust laws, in particular, were applicable to such transactions. In order to assure that *South-Eastern Underwriters* would not interfere with the traditional role of the states in regulating and taxing insurance, the McCarran Act provided that the business of insurance (but not the business of insurance companies) would receive the following exemption:

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act and the Act of October 15, 1914, as

Act. See RX 486C. While "regulated" in the McCarran Act sense has been found when the general language of the regulatory statute provided for "enforcement through a scheme of administrative supervision," *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958), or when the state specifically authorized the questioned activity, *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178 (6th Cir.), cert. denied, 409 U.S. 917 (1972), see the discussion herein under *State Action Defense* for the more stringent requirements of the *Parker* doctrine.

amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.<sup>283</sup>

As shown by the language cited above, whether the McCarran Act exemption applies to a particular practice engaged in by insurers (such as the joint setting of the rates for search and examination and settlement services) turns on the meaning of the phrase the "business of insurance," an issue which the Supreme Court has recently addressed in two antitrust cases.

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), an insurer (Blue Shield), as part of an effort to reduce the cost of meeting prescription drugs claims, entered into "provider" agreements with most of the pharmacies in San Antonio which stated that the prescriptions of policyholders would be filled at a flat rate of \$2 plus a direct payment by the insurer to the pharmacies

<sup>283</sup> 15 U.S.C. §§ 1011-1013.

for the cost of acquiring the drugs. If an insured elected to use a nonparticipating pharmacy, the pharmacy's regular price had to be paid, but Blue Shield would then make reimbursement for 75 percent of the difference between the nonparticipating pharmacy's full price and the \$2 flat fee. The discrepancy in benefits was obviously designed to discourage policyholders from patronizing nonparticipating pharmacies, with the result that a group of 18 pharmacies, who declined to participate in the \$2 plan, challenged the arrangement under the Sherman Act as both a form of price fixing and as a group boycott of nonparticipating pharmacies.

The Court's analysis of the San Antonio plan begins with the caveat that all antitrust exceptions are to be narrowly read so as to cover no more than the objective targeted by Congress for the exemption. Consistent with this basic tenet of statutory construction, all that is exempt from the antitrust laws under the McCarran Act is the "business of insurance" *not* the business of insurers. *Id.* at 211. Whether a particular practice meets this restrictive standard is to be resolved by deciding whether the putatively exempt practice relates to the spreading of policyholders' risk or underwriting. The opinion further suggested that the questioned practice must be an integral part of the contractual relationship between the insurer and the insured, and that the practice must not involve entities outside of the insurance industry.

While *Royal Drug* does not indicate that all three elements must be present in each instance, it is plain from the opinion that no practice can be subsumed within the "business of insurance" rubric unless the first test is met—the activity must minimally relate to risk spreading amongst policyholders since, according to the Court, risk spreading or "underwriting" is a "critical determinant in identifying insurance." *Id.* at 213. Having isolated risk



spreading as the quiddity of insurance, the Court then held that the San Antonio prescription plan received no anti-trust exemption because it only pertained to how risks are paid (i.e., how claims are satisfied) and not to risk spreading.

On the way to this result, the Court sounded a cautionary note against ready acceptance of insurance company assessment of its own risk spreading function with the admonition that notwithstanding the trappings of insurance, insurance company activity does not constitute the "business of insurance" if upon close analysis it is found that there is no real risk to be spread. This was the clear meaning of the heavy reliance in *Royal Drug* on *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959) in which self-styled "life insurance" companies offered variable annuity contracts that provided no fixed rate of return but only a pro rata participation in the investment portfolios of the companies. Although the contracts were regulated by state insurance commissions and involved some actuarial prediction of mortality, the Supreme Court there held that since by its terms the contract put all the risk on the annuitants and none on the so-called "insurers," the contracts were not the "business of insurance" within the meaning of the McCarran Act.

In further support of its emphasis on risk spreading as the linchpin of the McCarran Act exemption, the *Royal Drug* Court stated that the primary purpose of the act was to allow for cooperation in insurance rate making because the actuarial uncertainty involved in spreading insurance risks dictated that a prudent insurer would only set its rates after considering the collective claims history of other similarly situated insurers rather than relying solely on its own experience. The Court found support for this presumed need for cooperation in the risk spreading process from the legislative history of the McCarran Act, par-

ticularly in the draft bill and accompanying report of the National Association of Insurance Commissioners (NAIC) released on November 16, 1944, in response to *South-Eastern Underwriters*. The NAIC Report, which the Court describes as "particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Royal Drug*, 440 U.S. at 221, was specifically directed at the need for shared risk experience during the insurance rate making process. Contrasting the relative certainty of the mortality tables used in life insurance with the data that issuers of other forms of insurance (fires, casualty, surety, and inland marine) had to rely on, the NAIC report argued—

The fire, casualty, surety, and inland marine aspects of the insurance business differ widely from life insurance. In life insurance the gross rates are based upon a number of factors, including mortality tables. Mortality tables are based upon the certainty that everyone must die; the time of death is the only uncertainty. In the other fields of insurance there is no guarantee that the contingency insured against will occur at all. As a result rates in these other fields can be estimated with a lesser degree of certainty. Since rates in these other fields are based upon the law of averages it is manifest that the broader the statistical base the more accurate the average. The experience of individual companies is seldom a reliable guide for rate-making purposes. The structure of the fields of insurance under discussion is based upon these facts of common knowledge. Furthermore, many States have by statutory enactment insisted that companies act in concert for the purpose of collecting statistical data for rate making in these other fields in order to utilize these established principles—principles, we

may add, which are wholly inconsistent with the unrestricted competition contemplated by Federal antitrust laws. 90 Cong. Rec. A4405 (1944).

Contrary to the position advanced by respondents, however, neither *Royal Drug* nor the legislative history cited above suggests that all insurance company collective rate making is exempt. This is the clear holding of *United States v. Title Ins. Rating Bureau of Ariz. ("TIRBA")*, 700 F.2d 1247 (9th Cir.), cert. denied, 104 S. Ct. 3509 (1984), which applied *Royal Drug* to deny an antitrust exemption when insurers used a rating bureau to set common rates for escrow services. In *TIRBA*, the fact that the case involved insurers who were engaged in joint rate making was the starting point, not the end of an inquiry which led ultimately to the conclusion that the escrow or settlement services had nothing to do with risk spreading and therefore did not meet the "business of insurance" requirement. In reaching this result, the Ninth Circuit noted that there was no real insurance function at stake since escrow services, which essentially involves clerical transfers of papers and payment of consideration, are performed by separate departments in insurance companies or by separate but related companies, and are not only offered by insurance companies when no insurance is involved, but are offered by firms other than insurers.

It is also especially significant to this case that the *TIRBA* court gave short shrift to the title insurers' argument that they should be allowed to fix jointly the rate for escrow services because in the course of performing these services the companies do some evaluation of title defects, and thus the escrow process may have the effect of reducing the risk to them as title insurers. In answer to this argument, the Ninth Circuit, again relying on *Royal Drug*, drew a distinction between risk reduction and risk

spreading, and concluded that even if it can be shown that the settlement process, which includes an updated search and examination of title, helps to identify title defects and thereby reduces the risks of a title insurer, it is nevertheless not within the McCarran Act exemption because risk reduction is not synonymous with spreading risks more widely, and spreading risk, not risk reduction, is at the core of the cooperative risk allocation rationale of the McCarran Act.<sup>284</sup> In other words, *TIRBA* teaches that the McCarran Act should not be read broadly as exempting all rate making by insurers because such an approach not only begs the question as to whether the collective rate making relates to the "business of insurance," but it also ignores the clear admonition in *Royal Drug* that the risk spreading purpose of the exemption must be kept in the forefront in defining the "business of insurance." Certainly once this restricted purpose of the McCarran exemption is accepted, it necessarily follows (consistent with the basic tenet of narrowly applying antitrust exemptions) that the act cannot be interpreted so as to cover insurance company joint rate making that is unrelated to a pooling of risk experience.

Risk spreading and its central importance in defining the "business of insurance" was next taken up by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno*,

<sup>284</sup> As in *TIRBA*, respondents have argued here that during closing insurer-related closers verify that on-record liens have been removed and exercise special diligence in spotting off-record risks such as forgery. The *TIRBA* court did not consider these functions as constituting risk spreading or the business of insurance; moreover, there is nothing in this record to indicate that the zeal with which these non-insurance ministerial functions is carried out somehow depends on whether the closer is employed by a title insurer, bank, lawyer, independent closing company, or real estate broker. See Findings 180-184.



458 U.S. 119 (1982), which involved still another antitrust challenge to an insurer's attempt to reduce claims by a restrictive arrangement. There the insurer refused to pay substantial claims for chiropractic services unless the case had been reviewed and approved by a peer review committee. Pireno, a chiropractor, challenged the peer review requirement as a conspiracy and attempt to boycott. The Court confirmed the three-prong test suggested by *Royal Drug* in holding that the arrangement between the insurance company and the chiropractors was not part of the business of insurance since this practice, like the San Antonio prescription plan in *Royal Drug*, was aimed at reducing the cost of satisfying claims rather than risk spreading. Pireno added a gloss to the *Royal Drug* emphasis on risk spreading by saying that the practice must be "logically and temporally" connected to the spreading of risk, 458 U.S. at 130], but the result was the same as in *Royal Drug*—the review by the chiropractor peer committee was stricken because it was simply an aid in the claims payment process, and did not actually involve the spreading of risk.

Given the emphasis in *Royal Drug* and *Pireno* on risk spreading, respondents' insistence that *Equifax Inc.*, 96 F.T.C. 844 (1980) is dispositive is off the mark. The Commission held in *Equifax* that the McCarran Act exempts the deceptive gathering of medical histories because presumably the material was to be used in the process of spreading risk. The Commission's decision, however, has no bearing here since the record shows, as I will indicate later, that neither search and examination in general, nor the joint setting and examination fees in particular, have anything to do with spreading risk amongst an actuarially determined class of insureds. Equally misplaced is respondents' heavy reliance on *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir.

1973); *McIlhenny v. American Title Ins. Co.*, 418 F.Supp. 364 (E.D. Pa. 1976), and *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F.Supp. 564 (E.D. Pa. 1974) for the proposition that search and examination cannot be separated from the risk portion of title insurance. These cases, all decided before *Royal Drug*, have been distinguished as not having applied properly the crucial risk spreading test to discrete services offered by title insurers. *TIRBA*, 517 F.Supp. 1053, 1057, n. 2, *aff'd*, 700 F.2d 1247, 1251, n. 1.<sup>285</sup>

In focusing on risk spreading, I also necessarily reject respondents' argument that collusion by title insurers is exempt if not undertaken for the purpose of risk spreading, but rather to preserve their status as reliable insurers. The Court in *Royal Drug* specifically considered and dismissed the "reliable insurer" standard as too broad since every business decision made by an insurance company arguably has some impact on its status as a reliable insurer. 440 U.S. at 216-17. As for the legislative history, all that it will allow on this point is that a secondary purpose behind the McCarran Act was to permit the collective sharing of risk experience in order to preserve the solvency of insurers. But this limited objective cannot be transformed into a

<sup>285</sup> Post-*Royal* and *Pireno* cases which have allowed the exemption have turned on a factual determination that the questioned activity relates to risk spreading. See *Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 932 (9th Cir.), *cert. denied*, 104 S. Ct. 2346 (1984) (exemption allowed because "[t]he effect is to spread risk across a wide area, and that is precisely what the Supreme Court described when it formulated the risk spreading criterion"); *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1286 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983) (exemption allowed because "[i]t is the actuarial uncertainty inherent in projecting risks and the insurance industry's corresponding need for cooperation that makes its exemption from antitrust laws appropriate").

blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.

Finally, respondents argue that even apart from any consideration of risk spreading, there should be an exemption here because the states treat search and examination and settlement as part of the "business of insurance." But what constitutes the "business of insurance" under the McCarran act is a federal not a state question, and all cases from *Variable Annuity* to *Royal Drug* and *TIRBA* have not resolved that question on the basis of the state's definition of insurance. See, e.g., *TIRBA*, 700 F.2d 1249-50.

Turning then to the crucial risk spreading issue raised by *Royal Drug*, and putting aside for the moment the question of escrow or settlement services which was largely disposed of in *TIRBA*, I look to what the record tells us about search and examination.

To begin with, the record shows that historically search and examination were offered, and are still offered, apart from any concept of insurance or insurance risk spreading, and while the services have been engrafted onto an insurance framework as part of an overall marketing strategem designed to win the business of assuring good title away from abstractors and conveyancers, this does not logically transform the basic nature of the services, which are still largely ministerial functions irrespective of the particular evidence of good title that is the ultimate objective of the search and examination. But having largely succeeded in winning this competitive struggle for the search and examination business, respondents would then crown their triumph with an antitrust exemption although in the past their competitors were turned down in a comparable attempt at consolidation of market power. Thus in Virginia, where examination for title insurance may only legally be performed by lawyers, the bar sought to protect its monopoly against price competition by use of a

minimum fee schedule which was defended on the grounds that the services were being performed by a learned profession. After paying due deference to the practice of law as a scholarly pursuit, the lawyers who sit on the Supreme Court had no difficulty in recognizing search and examination as integral parts of the real estate business and held, "[w]hatever else it may be, the examination of a land title is a service." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). This easily identifiable service does not undergo a sea change, as respondents argue, when independent attorneys, for example, who were the subject of *Goldfarb*, don attorney-agent or approved attorney hats, and along with their other wares—abstracts, certifications, and opinions—now offer search and examination in an insurance package.

Second, the record shows that search and examination are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance. That is, even assuming that there is some small risk involved in title insurance (a point which will be taken up later) the risk has been isolated and assigned a dollar value for rate making purposes which is entirely apart from the non-risk part of the premium represented by the cost of conducting the search and examination. While this separation of search and examination from the risk element of a title insurance premium is most clearly shown by the existence of separate "risk" rates, it is also seen in the promulgation of inclusive rates that simply combine separate risk and search elements. The existence of this risk component—which is not challenged by complaint counsel (except in Ohio where it is alleged that the risk rate is inflated to include search and examination as well as settlement services)—is convincing evidence of a clear distinction between the search and examination func-



tion and whatever risk is assumed in the title insurance policy.

As for the joint setting of search and examination rates—the precise subject of this proceeding—this has no logical connection whatever to risk spreading since there is no evidence that joint rate making is undertaken by title insurers for the purpose of sharing their collective risk experience. To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (i.e., apart from the “risk” rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic rationale of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present.

As it happens, the connection between any aspect of title insurance and the notion of risk spreading is tenuous in the extreme. Few risks are assumed by title insurers since the very purpose of the entire title insurance process—from search and examination to binder to issuance of a final policy—is to eliminate risks by making certain that any serious defects in title are identified for the very purpose of seeing to it that they are not insured. To the limited extent that some risks are assumed by the title insurer, this, too, has nothing to do with the concept of risk spreading by a group of insurers. Disclosed risks are covered on the basis of individual company’s legal analysis of the seriousness of the recorded title defect as balanced against competitive pressure to insure over the risk or lose the business to another title insurer. Again, this is contrary to the very purpose of the McCarran Act since

risks are not underwritten on the basis of a collective pooling of risk experience.

As for hidden risks, this modest extension of title insurance beyond the scope of the abstract and the attorney’s opinion has nothing to do with either search and examination or risk spreading since by definition the service at issue here—search and examination of public records—cannot allocate amongst a universe of insureds what it could not uncover in the first place. In any event, there is not a whit of evidence that these hidden risks are somehow spread among policyholders during the rate making process on the basis of the shared risk experience of the insurer members of rating bureaus.

In sum, since the central purpose of the McCarran Act is to allow for cooperation in the setting of rates so that insurers may take advantage of their collective experience in spreading risk, there clearly should be no exemption here because search and examination rates are not only unresponsive to collective risk experience, but do not even reflect the risk experience of the individual insurer. Moreover, even apart from rates, the services themselves are not logically connected to risk assumption since the standard practice in the title insurance business is to exclude all elements of uncovered risk from the policy.<sup>286</sup>

<sup>286</sup> There is no basis on this record for concluding that respondents’ joint rate fixing practices should be condemned under the remaining two *Royal Drug-Pireno* criteria, i.e., the practice must not relate to entities outside of the insurance industry, and must be part of the insurer-insured relationship. There is no allegation in this complaint that respondents have extended their price-fixing activities to approved attorneys, independent attorneys, abstractors, surveyors, or anyone else besides their own agents and employees. And while search and examination in general and joint rate making in particular have nothing to do with risk spreading, there can be no question that these services (and the charges for these services) are part of the relationship between insurer and insured in the sense that the search and examina-

### The State Action Defense

While I have concluded that the search and examination and closing services (see discussion herein under *Settlement Services*) are not the business of insurance under the McCarran Act, respondents' joint rate making activities through rating bureaus would still be exempt from the federal antitrust laws if they met the requirements of the *Parker* doctrine as refined by *Midcal* and *Southern Motor Carriers*.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that Congress did not intend to apply the antitrust laws to state action regulating economic activity within its own borders, and while some state action may be invalid, say, blanket authorization by a state that businesses may violate the federal antitrust laws without regard to state supervision, the practices involved in *Parker* (a state-sponsored but grower-administered program for limiting raisin production) were held to be a proper exercise of state discretion. In its opinion, the Court indicated that the exemption was derived from the policy favoring a spirit of accommodation within our federal system in order to avoid unnecessary conflict between the mandates of national law governing interstate commerce and state regulation of intrastate activity that may have interstate implications. According to the Court, the exemption was also derived from the Tenth Amendment reservation of state sovereignty, as well as the belief that the states performed the useful function of serving as economic laboratories where diverse forms of regulation may be tested without interference from the federal government.

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tion determines what is excluded from the policy, and the joint rate making determines how much the insured pays for the coverage received.

The *Parker* doctrine lay largely dormant for some 40 years until there appeared a spate of cases, both private and public, challenging under the federal antitrust laws alleged anticompetitive actions by states and municipalities as well as the practices of private persons acting under the color of state law. In response to this wave of state action cases, there eventually evolved a restatement of *Parker* which provided that before any restrictive practice departing from the competitive norm can qualify for the state action exemption, first, it must be demonstrated that the state's intention to grant federal antitrust immunity is clearly articulated and affirmatively expressed as a matter of policy, and second, that the state actively supervises the process chosen to replace the competitive market. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). As it happens, the second prong of *Midcal* could not be met in *Midcal* itself since there was no state involvement beyond a statute requiring liquor wholesalers to charge prices posted by producers. Despite the outcome in *Midcal*, prior to 1985, enforcement actions involving the claim of a state action exemption largely concentrated on the first *Midcal* test since it was assumed that the more complex issue of state supervision presumably did not have to be faced unless the state compelled the anticompetitive conduct as proof of a clearly articulated and affirmatively expressed state policy to suspend the federal antitrust law. See, e.g., *Mass. Furniture and Piano Movers Ass'n. ("Mass. Movers")*, 102 F.T.C. 1176, *rev'd and remanded*, 773 F.2d 391 (1st Cir. 1985). The *Parker* doctrine underwent a further revision, however, on the basis of the Supreme Court's opinion in *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985) in which the Court rejected the notion that the first prong of the *Midcal* test requires compulsion, and held, instead (in a case involving joint rates filed by motor



carrier rating bureaus) that a state policy to suspend competition may be made manifest by the mere authorization of joint activity to the point that even a statutory reference to just and reasonable rates may be taken as an adequate indication that the state intended that rates were not to be set by the competitive market.

Because of the dramatic impact of *Southern Motor Carriers*, even before the first witness was heard in this case, complaint counsel conceded that it would not contest certain key aspects of respondents' state action defense. Thus complaint counsel acknowledged in its pre-trial brief that respondents' alleged price fixing activities in Arizona, Connecticut, Idaho, Montana, Ohio, and Wisconsin "are undertaken pursuant to a clearly articulated and affirmatively expressed state policy and satisfy the first prong of the *Midcal* test." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24 (Sept. 16, 1985). As for these six states, the only aspect of the state action defense which complaint counsel challenge is whether there is active state supervision. Respecting New Jersey and Pennsylvania, complaint counsel stipulated that there was active state supervision. Stipulation dated 11-25-85. Complaint counsel also conceded that it did not intend to challenge under any theory "price fixing in New Jersey or Pennsylvania on charges for search and examination and settlement services that do not involve attorney-agents." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24, n. 58 (Sept. 16, 1985). Finally, with respect to the five other states cited in the complaint (Louisiana, New Mexico, New York, Oregon, and Wyoming), these were dropped entirely from complaint counsel's case because "the quantum of proof necessary to resolve the question whether a state action defense is available appears to be greater than we originally anticipated" (Complaint Counsel's Trial

Brief at p. 2 Sept. 16, 1985), an obvious concession to *Southern Motors Carriers*.

As a result of complaint counsel's stipulations and concessions, the *Midcal* issues remaining under the state action point are first, whether there had been state authorization for joint fixing of charges paid to attorney-agents in New Jersey and Pennsylvania, and second, whether in Connecticut, Wisconsin, Arizona, Idaho, and Montana the rating bureau activities came under active state supervision. Ohio presents a special problem of determining whether search and examination rates were fixed at all.

The "authorization" issue in New Jersey and Pennsylvania is a question of statutory interpretation. Both states have authorized the joint filing of rates by the respective bureaus, and the only remaining issue is whether these states intend to include in the jointly fixed rates charges for search and examination and settlement when these services are performed by attorney-agents. While the statutes are ambiguous, New Jersey and Pennsylvania insurance regulators have clearly interpreted them to mean that the fees charged by all agents, including attorney-agents, should be regulated by the state insurance departments and may properly be fixed by the joint activity of the rating bureaus. The contrary view urged by complaint counsel may have been more creditable had it been shored up with testimony, documentary evidence, or citation to legislative history indicative of special circumstances (say, a successful campaign by the legal lobby in support of the parochial view that everything an attorney does should only be regulated by the bar or the judiciary), which might have justified an interpretation of the statute representing an extreme departure from the basic policy of these two states, i.e., to regulate (and concededly to supervise actively) all aspects of the title insurance business.

The other prong of the *Midcal* test—"active supervision"—is an emerging concept that the Supreme Court has yet to flesh out. In *Midcal* itself, the only Court case to address the point directly, California required liquor wholesalers to post retail prices, which in turn had to be charged retailers. The Court observed that, "The State neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. at 105-06. All that the state did in *Midcal* was simply to issue a directive that wholesalers must either file fair trade contracts or if they did not have fair trade contracts, they must post a resale price schedule which the retailers had to charge. From these facts the Court concluded that California exercised only a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

*Southern Motor Carriers* did not add significantly to *Midcal*. It only contained a passing reference to the active supervision concept since the case was disposed of on the "authorization" basis. At several points in the decision, however, the Court touched on the issue. The Court noted, "Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissioners actively supervise the collective ratemaking activities of the rate bureaus", 105 S. Ct. at 1730, and in n. 23, *id.* at 1729, the Court said—

Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S. at 351, 63 S. Ct., at 313-314; see *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71

S. Ct. 745, 95 L.Ed. 1035 (1951). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943. This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See I P. Areeda & D. Turner, *Antitrust Law* ¶ 213a, p. 73 (1978).

From the fragments in *Midcal* and *Southern Motor Carriers*, and from the Supreme Court's favorable citation to Areeda and Turner, complaint counsel urge the adoption of a strict procedural test for active supervision, which they claim finds support in the following discussion in that authoritative treatise—

. . . [state] agency inaction fails to satisfy the requirement of this Paragraph that there be adequate public supervision. Such inaction evades statutory approval procedures designed (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow judicial review of the agency record. Therefore, the general view is correct that official inaction does not constitute sufficient "state action" to justify an antitrust exemption. I P. Areeda & D. Turner, *Antitrust Law* ¶ 213f, pp. 78-79 (1978).

These comments by Areeda and Turner cannot be fairly transformed, as complaint counsel argue, into a hard and fast rule that for each rate change there must be a notice,



opportunity for comment (preferably through a hearing), and a written decision appealable to the courts. I believe that what Areeda and Turner were suggesting instead is that state inaction obviously does not show conscious review as would be evidenced, for example, by a hearing, argument, and a record. This does not mean that these procedures are the only ways of showing state review or are even the preferred way. For one thing, it could be argued that the adoption of such strict procedural requirements, which complaint counsel acknowledge are modeled on the federal Administrative Procedure Act, may be inconsistent with the *Parker* doctrine's underlying rationale of allowing the states to experiment with alternative means of regulation. Moreover, by making procedural fastidiousness the focus of the active state supervision inquiry, this may have the adverse effect of diverting public attention away from the diligence of state insurance commissioners, which in the real world may be the only effective protection for consumers whenever non-competitive pricing norms are adopted. Besides, insistence on strict procedural conformity can quickly degenerate into meaningless exercises in bureaucratic rubber-stamping of boiler-plate rulings. In some instances, of course, the diligent regulator may choose one of the procedures advocated by complaint counsel, i.e., a public hearing, as the appropriate response to a particular regulatory problem. To take one example, in *Southern Motor Carriers*, the Fifth Circuit was obviously impressed by just such a showing ("the record evidence that the commissions routinely suspend the effectiveness of proposed tariffs and conduct hearings satisfies us that the second prong of the *Midcal* test has been met." 672 F.2d at 474, n.5) but the conscientious insurance commissioner might have chosen just as readily some alternative way of determining the reasonableness of rates.

That *Parker* put the state's choice of procedure beyond the scope of federal review does not translate, as respondents argue, into a requirement that there be a docile acceptance of any regime that the states may set up as long as there exists an impressive array of latent supervisory power. Rather, what *Midcal* says is that in the context of an application for a federal antitrust exemption, the proper function of a court or administrative agency is to look at the state's regulatory machinery and make a determination as to whether there was, in fact, a review, monitoring, and an examination of critical aspects of the rate-making process. At trial what this comes down to is that since the "state action" exemption is a matter of affirmative defense, the initial burden rests with respondents to come forward with evidence showing that the state has a regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process. Once this capability is demonstrated, I believe that the burden then shifts to the government which has to prove that in actual practice the regulators did not make such an examination with respect to some crucial aspect of rate making. This allocation of proof is grounded on the assumption of official regularity and the concomitant notion that respondents should have no burden of proving that state officials do what they are supposed to do under their own statutes. Or to put it somewhat differently, if the claim is made that a facially plausible supervisory regime is demonstrably inadequate then the burden to prove this should be on the party—complaint counsel here—challenging state supervision. Such a challenge, however, should not be allowed to lapse over into a qualitative evaluation of the performance of state officials—for example, whether they put enough time or effort into reviewing a particular rate submission—since an inquiry along these lines would not only be contrary to the public policy

expressed in *Parker* of due deference to state sovereignty, but from a practical standpoint "[t]here simply is no way to tell if the state has 'looked' hard enough at the data." I P. Areeda & D. Turner, *Antitrust Law*, ¶ 213c, p. 75 (1978).<sup>287</sup> On the other hand, *Midcal* would have no meaning at all if the exemption were granted when the regulatory machinery is patently inadequate on its face, or when the evidence is incontrovertible, say, an acknowledgment by the state itself that its latent powers are simply not being used (or cannot be used) to review, monitor, and examine crucial aspects of rate making.<sup>288</sup>

<sup>287</sup> See also *Ferguson v. Skrupa*, 372 U.S. 726 (1963) for requirement of similar federal restraint before invoking the Due Process Clause to second-guess the economic programs adopted by state legislatures.

<sup>288</sup> Post-*Midcal* cases have allowed the exemption when the regulatory agency had broad regulatory powers and there was evidence the powers were used. The exemption has been denied notwithstanding the presence of latent regulatory power when the record revealed that the powers were not used. Compare *Capital Telephone Co. v. N.Y. Telephone Co.*, 750 F.2d 1154 (2d Cir.), cert. denied, 105 S. Ct. 2325 (1985) (active supervision found where Public Service Commission not only had broad latent powers to supervise telephone companies through hearings and examination of books, but also actually used the powers to investigate rates) with *State of N.C. Ex Rel. Edmisten v. P.I.A. Ashville*, 740 F.2d 274 (4th Cir.), cert. denied, 105 S. Ct. 1865 (1985) (finding of no active supervision on a record showing that although the state's grant of a certificate of need for a hospital acquisition was based on extensive review of the application, and the certificate could be revoked for failure to satisfy the conditions on which it was granted, the state did not monitor post-acquisition prices). *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir.), cert. denied, 105 S. Ct. 3501 (1985), and *Patrick v. Burget*, 5 Trade Reg. Rep. (CCH) ¶ 67,299 (9th Cir. Sept. 30, 1986) (represent the deference (grounded on concern for the quality of medical care) extended to state authorized peer review of doctors. This special treatment for the professions, which was suggested in *Goldfarb v. Virginia State Bar*,

Applying the standard outlined above to the six states in question, the record shows that in Idaho, there is a specific requirement for prior approval of rates which at least creates a presumption that there had been a scrutiny of bureau filings. I would not second-guess the intensity of that scrutiny when there is no evidence that any aspect of rate making, including insurer expenses, was excluded from that review.

In Arizona, where no major increase in search and examination rates was even proposed during the entire life of the Arizona Rating Bureau, again I do not believe there are adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. The record shows that the state was involved in what it considered to be a more immediate problem—the rating bureau's attempt to raise and then engraft jointly set escrow fees onto the existing rate structure—and it is unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates.

Ohio, of course, is a special problem: complaint counsel simply failed to prove that the rate schedule filed by the Ohio Rating Bureau resulted in uniform charges for search and examination and settlement, as alleged in the complaint.

421 U.S. 773, 788-89, n.17 ("[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently"), has no application to fixing the price for a commonplace commercial service such as the search and examination of real estate title. *Id.* at 787.



In Montana, Connecticut, and Wisconsin the states have adopted "file and use" or "use and file" statutes that reflect a basic policy of diminishing the role of state regulators in favor of reliance on competition as the market regulator. At the same time, these three states have authorized rating bureaus on the assumption that contrary to their basic policy of relying on the market to discipline sellers, the rating bureaus, as a medium for non-competitive, collective action by the insurers, will be closely scrutinized. The issue in these states then is whether there was a critical examination of the crucial aspects of joint rate making, a scrutiny which is inherent not only in the states' own regulatory policies, but also in the "active supervision" standard of *Midcal*.

In Montana, where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau.

As for Connecticut and Wisconsin, there is no need to dwell on the likelihood that because of complaint counsel's obsession with notice, hearing, and a written decision, their attention may have been diverted away from showing during their own case-in-chief that the regulatory scheme was an empty shell. Respondents' defense witnesses—the state insurance officials—readily identified aspects of joint rate making that they themselves considered crucial but which clearly were not being supervised at all. Thus the record shows that in Connecticut jointly fixed rate increases were filed with generalized justifications relating mainly to the profits of the insurers. The rates were "deemed" effective after a brief period because the state had taken no action. At most, during the "deemer" period,

the state merely reviewed for accuracy what the rating bureau gave it in the way of insurance company profitability. There was no critical examination whatever of what lay behind those profit figures. Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or "commission" expense and the cozy relationship between insurers and attorney-agents that fuels this expense. In other words, even though the Connecticut Insurance Department was convinced of the overriding contribution of the agent commission factor in increasing the cost of title insurance to consumers, it believed that it was statutorily barred from doing anything about it, and indeed that it would take new legislation for it even to acquire the power to look behind the reported insurer expenses. Thus by the state's own account (and irrespective of the broad array of latent powers it possessed in the insurance field or the elaborate supervisory regime it had established), it cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in rate making.

Similarly, Wisconsin followed a hands-off policy in dealing with title insurers. And again, it was a state official called by respondents who readily acknowledged that insurer expenses were simply not examined although the state recognized how critical these expenses were in rate making.

It must be emphasized that to require that these two states put into place and use a means for examining crucial aspects of joint rate making does not impose an onerous burden on them. Basic rates are not changed that often in the title insurance business, and I am not suggesting that a state may not adopt a sampling approach whereby only

across-the-board rate increases rather than adjustments or special endorsements are closely examined. But when the states themselves have identified a critical area, such as the agent retention expense, there must be a showing that the problem was addressed either before rates were increased or at least sometime during the period between major rate increases. And while I would also allow the states practically unlimited flexibility in how they chose to approach the problem, the point is that there is no proof in this record that these two states have taken any steps to deal with the agent-insurer relationship, or for that matter any other expense element factor impacting on title insurance rates.

Of course if the two states choose not to supervise actively by establishing and using a mechanism for scrutinizing the rate making process and especially the crucial expense component of that process, there is no federal requirement that they do so. But then insurers in those states should not be asking for a federal antitrust exemption, and instead the market should be allowed to accomplish what the states are either unwilling to do or are only willing to cover over with the "gauzy cloak" of supervision that *Midcal* says is not acceptable.

#### Settlement Services

The record fully supports the conclusion reached by the United States District Court For The District of Arizona and the Ninth Circuit in *TIRBA* that settlement or escrow services are clearly not the "business of insurance." However, in the only states where respondents, through title insurance rating bureaus, were allegedly fixing settlement or escrow rates, and the issue is properly before the Commission,<sup>289</sup> the complaint allegations cannot be sustained. In

<sup>289</sup> As indicated in Finding 186, the issue of settlement services in Arizona is not properly before the Federal Trade Commission.

Pennsylvania and New Jersey, where the rating bureau activity concededly was actively supervised by the states, the *Parker* exemption applies to search and examination as well as settlement services since the states authorized the alleged illegal joint activity relating to attorney-agents. In Ohio and Connecticut, there was a failure of proof that either the "risk" rates or the inclusive rates set in those states by the rating bureaus resulted in uniform settlement fees.

#### Noerr-Pennington

In addition to a claim of immunized state action, respondents have argued that their joint rate making consists of nothing more than "petitioning" of a state agency which is protected by the *Noerr-Pennington* doctrine. In *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961), *Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *California Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) the Supreme Court held that political advocacy — broadly interpreted as attempts to influence the legislature, the executive, or an administrative agency in the making of policy — was protected under the First Amendment right to petition as well as the public policy of encouraging the free flow of ideas to policy makers. To argue, as respondents do, that the joint fixing of rates by competitors somehow interferes with their right of political advocacy, is analogous to saying that contractors should be allowed to conspire to rig bids on government projects so long as the results of the conspiracy are wrapped in the trappings of a "petition" or proposal which may be said to convey policy information to official decision-makers. Nothing said before or after *Noerr, Pennington*, or *California Transport* allows for such a distortion of the concept of political advocacy, and the Supreme



Court, the lower courts, and the Commission have emphatically rejected similar attempts at such a misuse of the doctrine. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976); *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 409, 476-77 (5th Cir.), *rev'd on other grounds*, 105 S.Ct. 1721 (1985); *TIRBA*, 517 F. Supp. 1053, 1059-60 (D. Ariz.), *aff'd*, 700 F.2d 1247 (9th Cir.), *cert. denied*, 104 S. Ct. 3509 (1984); *Mass. Movers*, 102 F.T.C. 1176, 1222-24, *rev'd and remanded on other grounds*, 773 F.2d 391 (1st Cir. 1985).

#### Rule Of Reason

The Commission held in *Mass. Movers*, 102 F.T.C. at 1224, that if there were no state action exemption, the collective rate making activities of a rating bureau are not governed by the rule of reason because "it is clear beyond cavil that agreements among competitors to set price levels or private ranges are *per se* illegal under the antitrust laws. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940); *see also Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed. 2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*)."

#### Commerce

The search and examination and settlement services offered by respondents are part and parcel of the interstate sale and financing of real estate. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

#### Mootness

There can be no mootness defense in this case since respondents insist that search and examination services, as

part of the "business of insurance," are beyond the jurisdictional reach of the Commission, and they reserve the right to rejoin rating bureaus whenever they desire to fix collectively the rates for these services. In short, none of the conditions for preventing any future violation would be eliminated unless an order is issued. On this basis alone, this case is diametrically opposite to these instances (*see, e.g., United States v. W.T. Grant*, 345 U.S. 629 (1953); *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984)) in which the abandonment or mootness defenses were given limited recognition.

#### Scope of The Order

Complaint counsel insist that they are entitled to an "all-states" order although it is obvious that it takes a state-by-state analysis to determine where the *Parker* defense applies. Complaint counsel's argument that they are entitled to a broad order is unpersuasive considering the fact that the complaint cites respondents' activities in only 13 states and complaint counsel's post-complaint investigation apparently revealed that the state action defense would probably prevail in at least seven of those states. As complaint counsel would now have it, an order should be entered, which not only would retrieve the seven states they themselves dropped from the case, but also would add 37 more that were never in the case to begin with. Not only is an "all-states" order unsupportable, but on a record in which there is not a hint of any collusive rate making activity outside of the rating bureaus, a broad order covering all other possible forms of illegal combination cannot be justified.

## IV

## CONCLUSIONS

1. The Federal Trade Commission has jurisdiction in this matter because respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Providing search and examination services and settlement services is not the "business of insurance" as that term is used in the McCarran-Ferguson Act.

3. Respondents combined to fix the rate for search and examination services in the states of Connecticut, Wisconsin, Arizona, Idaho, and Montana.

4. The joint fixing of the rates for search and examination services described in Paragraph 3 above, while authorized by the aforementioned states, was not actively supervised in Connecticut and Wisconsin.

5. Respondents joint rate making activity respecting search and examination services and settlement or escrow services performed by attorney-agents in Pennsylvania and New Jersey was authorized by the states.

6. There was a failure of proof that respondents have fixed uniform search and examination and settlement or escrow charges in Ohio.

7. There was failure of proof that respondents have fixed uniform settlement or escrow charges in Connecticut.

8. The issue of joint rate making activity by respondents respecting settlement or escrow charges in Arizona is not properly before the Commission.

Accordingly, the following order should be issued:

## ORDER

## I

For the purposes of this Order, "Search and examination services" means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interests in the property.

## II

IT IS ORDERED that respondents, their successor and assigns, and their officers, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device shall cease and desist in Connecticut and Wisconsin from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

## III

IT IS FURTHER ORDERED that respondents shall within thirty days after service of this ORDER deliver a copy of this Order to all their present officers, directors, and personnel having any responsibility in determining rates as well as to the state insurance departments in Connecticut and Wisconsin.

## IV

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this Order.



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V

IT IS FURTHER ORDERED that respondents shall, within ninety days after the Order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

/s/ Morton Needelman  
MORTON NEEDELMAN  
Administrative Law Judge

DATED: December 22, 1986

No. 91-72

Supreme Court, U.S.

FILED

AUG 29 1991

OFFICE OF THE CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,  
*Petitioner,*  
v.

TICOR TITLE INSURANCE COMPANY, *et al.*,  
*Respondents.*

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

Whether joint rate filings by title insurance rating bureaus, authorized by state law, were "actively supervised" for purposes of the state action doctrine where (1) the state insurance departments had plenary power to review and disapprove the rates, (2) programs of supervision by state regulators were in place, staffed and funded, (3) state laws granted the regulators the power and duty to regulate pursuant to standards that were enforceable in the state courts, and (4) the regulators demonstrated a basic level of activity in carrying out the policies of the states, including reviewing the reasonableness of the filed rates.

**RULE 29.1 LISTING OF PARENT COMPANIES,  
SUBSIDIARIES AND AFFILIATES**

Respondents *Ticor Title Insurance Company, Chicago Title Insurance Company* and *SAFECO Title Insurance Company* (now known as *Security Union Title Insurance Company*) are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary or affiliate of these Respondents has publicly traded common stock.

Respondent *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Universal Leaf Tobacco Company, a publicly-owned corporation. No non-wholly-owned subsidiary or affiliate of Lawyers Title Insurance Corporation has publicly traded common stock.

Respondent *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation. Non-wholly-owned subsidiaries and affiliates of Stewart Title Guaranty Company are listed in the Appendix hereto.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 91-72

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FEDERAL TRADE COMMISSION,  
*Petitioner,*

v.

TICOR TITLE INSURANCE COMPANY, *et al.*,  
*Respondents.*

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit**

---

**BRIEF IN OPPOSITION**

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**STATEMENT OF THE CASE**

This case involves state-licensed rating bureaus in the title insurance industry that filed rates with state insurance regulators. The Third Circuit correctly held that the bureau rate filings were actively supervised by the states. As a result, their rate filing activity was protected by the state action doctrine.

In January 1985, the Federal Trade Commission ("FTC" or "Commission") initiated an administrative proceeding claiming that title insurance rating bureau activity in thirteen states violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1).<sup>1</sup> As

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<sup>1</sup> At the time the administrative complaint was filed, the FTC also was pursuing similar enforcement proceedings challenging



a result of this Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the FTC dropped five of the original thirteen states and proceeded to an administrative trial alleging violations in the remaining eight.

Almost five years after the filing of the complaint, the FTC, through four commissioners and in four separate opinions, held that the state action doctrine did not protect the title insurers from antitrust liability in six states because the requirements for application of the doctrine set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* ("Midcal"), 445 U.S. 97, 105 (1980), were not satisfied. In two states (New Jersey and Pennsylvania), the FTC majority found that the states' regulation was not pursuant to "clearly articulated state policy" because in the FTC's view the state insurance regulators had misinterpreted the scope of their regulatory authority under state law. Petition Appendix ("Pet. App.") at 49a-52a. In the four other states (Arizona, Connecticut, Montana and Wisconsin), the FTC majority found that the state insurance regulators had not "actively supervised" the collective rate filing activity, notwithstanding the conceded existence of regulatory programs and administrative scrutiny of bureau filings. The FTC made a state-by-state examination of whether the state had "actually exercised its authority," Pet. App. at 54a, evaluating whether the state agency "consciously consider[ed] the anticompetitive consequences of the activity for which private parties seek approval," *id.* at 55a. The Commission emphasized that the question was whether the regulator had "meaningfully examine[d]" or "meaningfully regulate[d]" the rate filings. *Id.* at 59a, 62a.

The Third Circuit Court of Appeals reversed and vacated the FTC's Order, finding that the title insurers'

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the rate filing activities of motor carrier rate bureaus. *In re New England Motor Rate Bureau, Inc.*, Docket No. 9170; *In re Motor Transport Association of Connecticut, Inc.*, Docket No. 9136.

rate filings through rating bureaus were protected from federal antitrust liability under the state action doctrine. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991), Pet. App. at 1a-40a. As to the two states in which the FTC found that the state regulators had misinterpreted their statutory authority, the Court of Appeals rejected the FTC's interpretation of state law. It held that the "principles of federalism and state sovereignty" underlying the state action doctrine require an evaluation of how state courts in those states would construe those laws. Pet. App. at 19a, 24a. In light of the intent of those states to broadly regulate title insurers and the consistent construction of state law by the state agencies charged with its enforcement, the Third Circuit found the state regulators' interpretations of their own laws "worthy of our deference." Pet. App. at 20a.

With respect to active supervision, the Third Circuit determined that the FTC's standard "would in effect, try the state regulator," Pet. App. at 32a, even though the "principles of federalism and state sovereignty that undergird the [state action] doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable." Pet. App. at 37a. The Third Circuit held that, as articulated by this Court, active supervision requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Pet. App. at 26a, quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). Applying this principle, the Third Circuit employed the test recently used by the First Circuit in reviewing another of the FTC's rating bureau cases: does the state agency have "the authority to 'review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,' and does the agency 'review[] the reasonableness of the [filed] rates.'" *New England Motor Rate Bureau v. FTC*, ("New England"), 908 F.2d 1064, 1070 (1st Cir. 1990).

Criticizing the FTC's approach as "too demanding in the showing it would require as to the rigor and efficiency of a particular state's regulatory program," the Third Circuit held that a state had exercised its power to control joint rate filing in a state where the following could be shown:

Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

Pet. App. at 28a, *quoting New England*, 908 F.2d at 1071.

Applying this test, the Third Circuit concluded that the active supervision requirement was satisfied in each of the states at issue. Arizona, Connecticut, Montana and Wisconsin plainly had authority to review and disapprove filed rates. The Third Circuit also concluded that the insurance department in each of these four states had exercised its power to control collective rate filing by reviewing the reasonableness of the filed rates under state statutory criteria. In each of the four states there was a program of supervision in place during the relevant time period, staffed and funded. Each of the states granted to its state insurance department ample power and the duty to regulate pursuant to declared standards of state policy, a duty enforceable in the states' courts. Finally, in each of the states the insurance department had demonstrated some basic level of activity directed toward seeing that "the private actors carry out the state's policy and not simply their own policy." Pet. App. at 29a-38a.

The FTC predicates its petition for certiorari upon the Court of Appeals ruling with respect to Montana and Wisconsin. Petition ("Pet.") at 15-17. As to Arizona and Connecticut, while contending that the Court of Ap-

peals erred in its review of the record evidence, the FTC concedes that the purported errors "might not warrant certiorari." Pet. at 20.

### REASONS FOR DENYING THE WRIT

The Court of Appeals decision does not warrant review. The decision below reversing the FTC reflects the considered and careful judgment of both the First and Third Circuits regarding the application of the "active supervision" requirement in the context of state authorized rating bureaus. It is faithful to this Court's state action precedent and creates no conflict with decisions of other circuits.

The legal standard argued for in the petition bears little resemblance to the reasoning applied by the FTC in its administrative decision, which was based on a review of whether the states' regulatory supervision was "meaningful," in the opinion of the FTC. The federalism principles that underlie this Court's state action cases required that the Third Circuit reject the FTC's approach. Rather than defending the "meaningfulness" standard, the petition proposes a new standard, under which the state regulator must determine whether the challenged private conduct is "consistent with state policy." Pet. at 10. This new standard is not properly before this Court, and in any event is fully satisfied by the Third Circuit's conclusion that the state regulators in this case reviewed under state law standards the reasonableness of the rates filed by the rating bureaus.

The petition's real challenge is not to the legal standard applied by the Court of Appeals, but rather to the factual basis for the court's conclusion. The record, however, contains ample support for the Third Circuit's decision. A controversy such as this, which is based purely on differing assessments of the facts, is not appropriate for review by this Court.



**I. THE THIRD CIRCUIT FAITHFULLY APPLIED THIS COURT'S STATE ACTION PRECEDENT IN REVERSING THE FTC'S ATTEMPT TO REVIEW THE MERITS OF STATE REGULATORY DECISIONS.**

As the Third Circuit recognized, this Court's state action jurisprudence "rests on principles of federalism and state sovereignty," Pet. App. at 13a, quoting 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987). For this reason, this Court has consistently articulated the importance of respect for state decision making in cases involving varying applications of the state action doctrine. See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("The Court did not suggest in *Parker* [v. *Brown*, 317 U.S. 341 (1943)], nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely."); *Southern Motor Carriers Rate Conference v. United States*, ("Southern Motor Carriers"), 471 U.S. 48, 56 (1985) ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."). In its most recent state action decision, this Court, "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect," expressly rejected the notion that the state action doctrine "transform[s] . . . state administrative review into a federal antitrust job." *City of Columbia v. Omni Outdoor Advertising*, ("City of Columbia") — U.S. —, 111 S.Ct. 1344, 1350 (1990), quoting *P. Areeda & H. Hovenkamp*, *Antitrust Law* § 212.3b, p. 145 (Supp. 1989).

The FTC's approach below to the active supervision requirement runs directly counter to this Court's teachings. The FTC concluded that the critical question was whether the state regulator had "meaningfully examine[d]" or "meaningfully regulate[d]" the rate filings. Pet. App. at 59a, 62a. Using this meaningfulness ap-

proach, the FTC discarded any pretense of respect for state decision making, and evaluated the merits and quality of state regulatory decisions. For example, it concluded in Connecticut and Wisconsin that the regulators "could not meaningfully regulate a critical component of the ratemaking process" because they could not directly regulate insurer expenses. *Id.* at 59a, 62a. The Commission found no active supervision with respect to certain rate filings in Arizona and Wisconsin, where the filed rates were based on historical rates that had been produced by market competition, because "accepting prevailing rates is not permissible." Pet. App. at 60a, 64a.

Other judgments concerning the merits of state regulatory decisions and the quality of state regulatory activity permeate the FTC decision. For example, Commissioner Strenio, who authored the majority's decision, concluded in his separate statement that in one instance Connecticut "should have disapproved the rates as excessive." Pet. App. at 132a. He also cited as evidence of an absence of active supervision in Arizona that the state "could not actively supervise the industry for an extended period because it had no qualified personnel," based upon his own prior "rate review experience" as a member of the Interstate Commerce Commission. Pet. App. at 135a.<sup>2</sup>

The Court of Appeals correctly held that the "root of the FTC's error" lay in its "insistence on sitting 'in judgment upon the degree of strictness or effectiveness with

<sup>2</sup> Commissioner Azcuenaga, dissenting as to two states, criticized the Commission majority for requiring that the state agency must "consider the anticompetitive consequences of the private acts it is reviewing." Pet. App. at 113a. In her view, that statement "reveal[ed] a fundamental misunderstanding of the state action doctrine." Pet. App. at 113a. Commissioner Azcuenaga also said that "the Commission should decline to accept [Commissioner Strenio's] invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel." *Id.* at 123a.

which a state carries out its own statutes.'” Pet. App. at 32a, *quoting New England*, 908 F.2d at 1076 (emphasis in original). It characterized the FTC’s analysis of the active supervision issue in the following terms:

The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal*’s adequate supervision prong because the regulators in those states were unqualified, they approved rates that the FTC’s commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable.

Pet. App. at 37a. The Court of Appeals concluded that even if the FTC’s evaluation of the quality of regulation were correct, “its conclusions miss the point”:

Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable.

*Id.*

The First Circuit in *New England* expressed the same reaction to the FTC’s similar mode of analysis in that case. In reversing the Commission, the First Circuit stated:

The FTC’s position, at bottom, seems to be that the “active supervision” prong necessitates an inquiry by the FTC into whether a particular state’s regulatory operation demonstrates satisfactory zeal and aggressiveness. The FTC would, in effect, try the state regulator. We think this goes too far.

908 F.2d at 1075. In the view of the First Circuit, by the Commission’s standard “the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state’s action, it would be-

come a means for federal oversight of state officials and their programs.” 908 F.2d at 1071.<sup>3</sup>

The Third Circuit decision is entirely consistent with, and indeed is compelled by, the federalism principles articulated in this Court’s state action precedent. Last term in *City of Columbia*, this Court refused to create a “conspiracy” exception to the state action doctrine in part because of concern that such an exception would impair the viability of the doctrine by involving antitrust courts in a “deconstruction of the governmental process and probing of official ‘intent.’” 111 S.Ct. at 1352. This Court stated that “[a]ll anticompetitive regulation would be vulnerable to a ‘conspiracy’ charge” and that “such an exception would virtually swallow up the *Parker* rule.” *Id.* at 1351. In *Southern Motor Carriers*, this Court determined that the “clear articulation” requirement of the state action doctrine does not mean that state law must compel, rather than merely permit, private entities to behave in an anticompetitive manner, because to rule otherwise would “reduce[] the range of regulatory alternatives available to the State.” 471 U.S. at 61. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985), this Court rejected the argument that the “clear articulation” requirement means that state statutes must ex-

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<sup>3</sup> In *Southern Motor Carriers* this Court acknowledged the legitimacy and usefulness of collective rate filing through rating bureaus as part of a system of state rate regulation. 471 U.S. at 51. The FTC in its petition nonetheless displays overt animosity to this state regulatory alternative, asserting that the present case involves “horizontal price-fixing” that is “even more dangerous [to society] than ordinary price fixing” because of a state agency’s monitoring of the “cartel.” Pet. at 20-21. This same bias against the states’ regulatory choices was reflected in the FTC decision below, as was candidly admitted by Commissioner Azcuenaga in her separate opinion: The “majority’s apparent distaste for state-regulated price-fixing, which I share, perhaps carries more weight than it should in the majority’s analysis of active supervision.” Pet. App. at 113a.



pressly contemplate particular anticompetitive effects, stating that “[n]o legislature can be expected to catalog all of the anticipated effects.”

In this case the Third Circuit, following the First Circuit, faithfully applied these principles of federalism to reverse the FTC. The FTC decision demonstrated precisely the “intrusive inquiry into state administrative processes” that the petition now pretends to condemn. Pet. at 11. Moreover, the FTC decision failed to provide any objective standard of active supervision. Such an unstructured and intrusive inquiry leads to “uncertainty among business, consumers, and regulators,” in precisely the manner that the petition attributes to the Third Circuit. *Id.* The FTC’s unconstrained second-guessing of the wisdom and competence of state regulatory efforts leaves regulated private parties with no guidance concerning whether they may in confidence engage in conduct authorized by state law. This very uncertainty deters private parties from engaging in state-authorized conduct and reduces the range of state regulatory alternatives. *Cf. Southern Motor Carriers*, 471 U.S. at 61.

In contrast to the FTC’s freewheeling approach, the standard applied below and by the First Circuit in *New England* focuses on whether the state “has and exercises” power to review the acts at issue. Pet App. at 27a, citing *Patrick v. Burget*, 486 U.S. at 102. In assessing whether the state “has” regulatory power, the Third Circuit looked to whether the state agency had the legal authority to review and disapprove filed rates.<sup>4</sup> Pet. App. at 28a. This initial focus of the Court of Appeals test is consistent with the body of cases in this Court and others that have resolved the active supervision issue by inquiring whether state statutes grant authority for substantive

<sup>4</sup> The brief for Amicus Curiae alleges that Montana and Wisconsin do not authorize collective rate filing by rating bureaus. Amicus Brief at 9. The petition makes no such claim and indeed the FTC throughout this proceeding has conceded that joint rate filing was authorized by these states. Pet. App. at 184a.

review of regulated conduct. *E.g. Patrick v. Burget*, 486 U.S. at 102; *324 Liquor Corp. v. Duffy*, 479 U.S. at 345; *Midcal*, 445 U.S. at 106.<sup>5</sup>

But the standard applied by the Court of Appeals goes further, requiring evidence that the state in fact “exercised” its system of regulation by establishing a staffed and funded program that grants state officials “ample power and the duty to regulate pursuant to declared standards of state policy,” and that is “enforceable in the state’s courts.”<sup>6</sup> Pet. App. at 28a. The existence of an agency with authority to engage in substantive review is by itself a strong indication that the state is acting to see its policy carried out.<sup>7</sup> *New England*, 908 F.2d at 1072.

<sup>5</sup> Lower court cases finding active supervision exclusively on the basis of the existence of a regulatory program include *Capital Telephone Co. v. New York Telephone Co.*, 750 F.2d 1154, 1163-64 (2d Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985); *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), cert. denied, 459 U.S. 1022 (1982); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982); *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981); *Capital Telephone Co. v. Schenectady*, 560 F. Supp. 207, 210-211 (N.D.N.Y. 1983); and *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641 (N.D. Ohio 1982).

<sup>6</sup> The petition questions whether the active supervision requirement is satisfied by the “mere availability of a possible judicial remedy” in the state courts. Pet. at 18. But the existence in this case of staffed and funded regulatory bodies with specific statutory duties makes this issue irrelevant. Unlike *Patrick v. Burget*, statutory authority exists here for state agencies to engage in a review of the filed rates for conformance to state policy. Compare 486 U.S. at 102. As the Court of Appeals correctly recognized, state legal mechanisms providing for judicial oversight of regulators’ actions through mandamus or appellate review provide further assurance that the state, through its regulators, supervises private conduct for conformance to state policy.

<sup>7</sup> The emphasis of the First and Third Circuits on the existence of agency authority is consistent with the presumption of regularity generally afforded under the law to the actions of public

No decision of this Court has ever required more. Nonetheless, the Third Circuit went on to demand evidence showing "some basic level of activity [by the state] directed towards seeing that the private actors carry out the state's policy and not simply their own policy." Pet. App. at 28a, *quoting New England*, 908 F.2d at 1071.<sup>8</sup>

Rather than being a "watered-down" test of active supervision, as the petition argues, the Third Circuit's

officials. In effect, the petition acknowledges that when by statutory mandate state officials must enforce state policy, there does exist "a presumption that [they] have made an affirmative determination that the rate is in accord with state policy." Pet. at 17 and n.6. Although the petition asserts that no such mandate exists in Montana and Wisconsin, *id.*, the statements of statutory purpose and the specific rate provisions of the insurance laws of both of these states require that rates not be excessive, inadequate or unfairly discriminatory, and require the insurance department to enforce the provisions of these statutes. Mont. Code Ann. §§ 33-16-101(1), 33-16-201(1)(a) (1989) ("[r]ates shall not be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory"); § 33-1-311(1) ("[t]he Commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code"); Wisc. Stat. Ann. §§ 625.01(2)(a), 625.11(1) ("[r]ates shall not be excessive, inadequate or unfairly discriminatory"); § 601.41(1) (West 1980) ("[t]he commissioner shall administer and enforce chs. 600 to 646"). Thus the argument that state officials have unfettered discretion whether to review, or not review, filed rates is refuted by the statutes of both states.

<sup>8</sup> Any test of active supervision which involves an evaluation of the actual activities of state regulators risks, as the Administrative Law Judge at the FTC observed, "laps[ing] over into a qualitative evaluation of the performance of state officials." Pet. App. at 239a. For this reason, it could be contended that the proper test should inquire simply whether a program of supervision has been established by the state, and should eschew any inquiry into the actual activities of state regulators. Though it did not adopt this view, the Court of Appeals, acting in the spirit of this Court's decision in the *City of Columbia* case to protect the viability of the state action doctrine, scrupulously avoided any "qualitative evaluation" of state regulators' conduct.

standard goes beyond this Court's holdings in its effort to give full effect to the language of the *Patrick* case indicating that the state must "have and exercise" regulatory authority over the private conduct. 486 U.S. at 101. In doing so, the First and Third Circuits have crafted a careful approach that permits a focused but deferential inspection of actual state supervision, leaving to the states themselves rather than federal antitrust authorities the responsibility for enforcing state regulatory programs. Such an approach successfully avoids transforming "state administrative review into a federal antitrust job," the result condemned by this Court in *City of Columbia*, 111 S.Ct. at 1344.

## II. THE NEW STANDARD PROPOSED BY THE PETITION DOES NOT WARRANT REVIEW IN THIS COURT.

The petition attempts to sidestep the federalism problems inherent in the FTC's decision. It contains no defense of the meaningfulness standard used by the FTC to justify its intrusive scrutiny of state regulation. Instead, it proposes a new and quite different standard—neither applied in its own decision nor presented in its brief in the Court of Appeals. Under the petition's standard, in order to actively supervise, state officials must "determine[] whether particular prices . . . are consistent with State policy." Pet. at 10. This vacillation by the FTC suggests that it does not know what standard of active supervision it wishes to embrace.

This Court should decline consideration of this new standard in this case, where the FTC is unwilling to defend the legal rationale that it employed in reaching its administrative decision. The Court's "normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). See generally R. Stern, E. Gressman and S. Shapiro, *Supreme Court Prac-*



tice § 6.26 at 364 (6th ed. 1986). This rule applies with particular force here. By putting forward in its petition a legal standard that has never been applied according to its terms, the petition raises obvious ripeness concerns. See, e.g., *Chemical Manufacturers Association v. EPA*, 870 F.2d 177, 233, *modified on other grounds*, 885 F.2d 253 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1936 (1990). The Commission's abandonment of the standard it actually applied also violates the principle of administrative law that an agency may not on appeal change the original rationale for its conclusions. See, e.g., *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986).

Even if the new standard proposed in the petition were properly in issue, it would not strengthen the argument for review by this Court. The application of the active supervision requirement here would not be materially affected by substituting the petition's formulation for the standard adopted by the First and Third Circuits. The petition argues that the Court of Appeals decision should be reviewed because it found active supervision "where state officials do not determine whether the prices meet the State's regulatory criteria." Pet. at 17. But the Court of Appeals concluded that in each of the states at issue, the state regulators in fact "reviewed the reasonableness of the title insurance rates" pursuant to the standards of reasonableness set by state law.<sup>9</sup> Indeed, the petition itself refers to this conclusion. Pet. at 7, 8. This conclusion by the Court of Appeals concerning the activities of the state regulators in this case would appear to satisfy precisely the new standard now urged by the petition.

<sup>9</sup> Each state at issue was found by the Court of Appeals to have satisfied the second factor articulated in the *Mideal* and *324 Liquor* cases, that "the state reviews the reasonableness of the rates." Pet. App. at 31a (Arizona), 33a (Connecticut), 35a (Montana), and 37a (Wisconsin).

### III. THE PETITION RESTS ON DISPUTES OF FACT THAT ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The petition in reality invites this Court to provide a second level of judicial review of the voluminous record in this case. The petition asks the Court to re-evaluate the *factual* basis for the Court of Appeals finding of active supervision. This Court should decline to do so.

The factual character of the FTC's arguments is apparent at the most fundamental level. The issue framed by the petition is whether active supervision can exist where the state regulators "do not determine whether the [filed rates] meet the State's regulatory criteria," Pet. at I. But the petition concedes that the Court of Appeals in fact concluded that the state regulators "review[ed] the reasonableness of the title insurance rates," pursuant to their statutory authority. *Id.* at 7, 8. Thus the very question presented in the petition rests on a factual dispute between the FTC and the Court of Appeals.

The factual character of the FTC's arguments is also reflected by the FTC's earlier failure to seek certiorari to review the Court of Appeals standard when it was originally articulated in the *New England* case. The petition makes clear that the FTC's hostility to the standard in this case is attributable to what the FTC views as different factual circumstances in the two cases. Pet. at 15, n.5.

Finally, the factual nature of the FTC's objection to the Third Circuit's decision is apparent from its attempt to differentiate among the states at issue on the active supervision question. The petition does not argue that the Court of Appeals applied different legal standards to the various states, but it seeks certiorari only as to Montana and Wisconsin, arguing as to Arizona and Connecticut merely that the Court of Appeals "refus[ed] to accept the Commission's appraisal of the evidence." Pet. at 20.

The petition's real complaint is not the legal standard applied by the Third Circuit, but the factual basis for the court's conclusions. Thus it alleges that there is not "a sufficient factual basis" for the Third Circuit's conclusions regarding Wisconsin, and recites a small part of the factual background of both Wisconsin and Montana. Pet. at 15-16. Fact-oriented issues of the character raised by the petition are not appropriate for review in this Court. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); see *Texas v. Mead*, 465 U.S. 1041, 1043 (1984).

Indeed, the administrative record, as established in the findings made by the administrative law judge and in the uncontested record evidence, contains abundant evidence to show that in both Montana and Wisconsin the regulators acted to review the filed rates for conformance to state policy. Only by perpetuating the principal error of the FTC decision below and making *qualitative* judgments about the regulators' actions can the petition argue that their actions did not constitute "supervision" for conformance to state policy.

#### A. Montana.

In Montana the rating bureau obtained its license in July 1982 and was defunct by the end of 1984. It made one major rate filing in February 1983. As regards this filing, the ALJ's finding, which was accepted by the Commission, was that "a representative of the Montana rating bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form of financial data showing the profitability of agents and insurance companies for the past five years." Pet. App. at 213a. At the administrative hearing the witness who was present at this meeting with the regulators testified as follows:

We took a look at the filing, discussed the filing for a while, talked about its contents and discussed also what type of justification they [the state] would want as far as statistics.

Tr. 2858.

The record shows that the regulator's request for additional information made at the meeting was to supplement the information contained in a five-page, single-spaced letter which was submitted in support of the rate filing. CX 41A-41E. That letter presented extensive revenue, expense and profitability data for the title insurance industry on a nation-wide basis, for the express purpose of demonstrating that the filed rates conformed to the Montana statutory rate criteria. CX 41A. Among other things, the letter pointed out that the industry nationally had incurred substantial losses in the real estate recession of 1980, 1981 and in the first half of 1982, and that these business conditions had direct implications for the solvency of title insurers. CX 41B-41D. The letter proposed development of a method of statistical data collection which would provide Montana-specific information on industry profitability in further support of the filed rates, CX 41E, though it noted that Montana accounted for somewhat less than  $\frac{1}{4}$  of one percent of the revenue of the title insurance industry nationwide, CX 41A. This statistical data collection was later undertaken, but before the consultant hired by the rating bureau could complete his work, most members of the rating bureau had resigned from the organization. Tr. 2857, 2868.<sup>10</sup>

<sup>10</sup> In Montana there also had "been a history of state involvement in the controlled business and agent commission problems" in the title insurance industry leading ultimately to specific state legislation on these subjects. Pet. App. at 242a. The record also shows that the Montana Insurance Department was an active participant on a task force formed by the National Association of Insurance Commissioners to study the title insurance industry which ultimately led to a Model Title Insurance Act, subsequently adopted by Montana. RX 502Z-44; RX 502Z-103; RX 502Z-120.



On this record and his own fact findings for Montana, the ALJ found "inadequate basis in the record for questioning state supervision during the brief existence of the rating bureau." Pet. App. at 242a. The rate filing was reviewed and approved by the state regulator. Indeed the copy of the rate filing introduced by the FTC in the administrative hearing bears a "reviewed and filed" stamp by the regulator, CX 41A, and the petition itself admits that the state regulator, after discussing the supporting information submitted with the filing, affirmatively "told the [title insurers] that the collective rates would go into effect immediately." Pet. at 16. Only by concluding that the review and approval by the Montana regulator was qualitatively insufficient can the petition now argue that "Montana made no judgment that [the filing] furthered state policy." *Id.* By pressing this argument in the petition, the FTC perpetuates the erroneous view permeating its decision below that it may sit in judgment of the quality of state regulators' actions.

#### B. Wisconsin.

The Wisconsin rating bureau submitted general rate filings in 1971, 1981 and 1982, as well as various endorsement filings. The ALJ's findings with respect to the 1971 Wisconsin filing were as follows:

In response to the 1971 filing, the Office of the Commissioner raised some questions about the bureau's reasons for limiting search and examination charges to the southeastern counties of the state only. The issue was eventually resolved by the publication of state-wide search and examination charges. The 1971 rates, which represented historical rates charged before the formation of the bureau, *were approved* although supporting justification was not provided until 1978.

Pet. App. at 197a-198a (emphasis added). The uncontradicted record evidence shows that before the regulators

approved the 1971 filing there was the following activity: rating bureau members met with officials of the insurance department prior to the 1971 filing (RX 302, Tr. 1619-1620); the department indicated that it would carefully review the filing (RX 302, Tr. 1621); the department responded to the filing indicating that the rates were "acceptable" but requesting additional information (RX 303, Tr. 1623, 1625); the department rejected the explanation that was offered by the rating bureau (RX 312, Tr. 1626).<sup>11</sup>

The uncontroverted record with respect to the 1981 and 1982 filings similarly demonstrates substantial regulatory attention. After receipt of the 1981 filing, the insurance department analyst determined that it involved a rate increase of "approximately 11 percent." Tr. 1751. He "discussed it with [his] supervisor" and told him that "it would be wise for us to look at it closely." Tr. 1750. The supervisor "agreed with [his] opinion" and told the analyst "to go through it from head to toe." Tr. 1751. Thereafter, the analyst checked the filing for mathematical accuracy, checked it against the financial and statistical information collected from the title insurance

<sup>11</sup> After approving the 1971 rate filing on grounds that the rates reflected existing title insurance rates, the department followed up on its activities. It pursued the rate justification issue again with the bureau in 1973 and meetings were held in July 1973 and March 1974 to discuss the matter. (RX 305-307, 309-309A). The department in 1974 formally requested submission of statistical information (RX 316); it held hearings in February and April 1975 to discuss rate justification and other title insurance issues (RX 320-320E, Tr. 1634). The proposed data collection system designed for the bureau by the Arthur D. Little consulting firm was submitted to the department by letter in August 1976. RX 334-334Z-19; Tr. 2587-2588. Bureau personnel met with department personnel in September 1976 to discuss the data collection systems (RX 336-336B, RX 340); the plans were officially submitted to the department in November 1976 and the department acknowledged the filing of the plans in January 1977 (RX 340, 341).

industry, checked it against the annual statements of the title companies and "adjusted the rates at different levels to see how different rate increases would amount residential versus commercial [sic] and played with different kinds of rates and so forth." Tr. 1752. Under questioning by the ALJ, the analyst testified that he "looked at the submission by the rating bureau very carefully because it was a substantial one." Tr. 1824. Insurance department personnel met with rating bureau representatives in May and July 1981 to request further information and discuss the filing. RX 369-369A; Tr. 1646-47, 1710, 1755-56, 1713.

The analyst compared the 1981 proposed rates with rates that were in effect in Minnesota and Illinois. Tr. 1825. Although he thought there were "grounds to attack" the filing and that there were some "weaknesses in it," he "went through a weighing and judgmental process" and "came to the conclusion that it was justified." Tr. 1824-25. He testified that he "gave the 1981 filing an intensive review." Tr. 1799. Thereafter, the analyst informed the president of the Wisconsin rating bureau that the department accepted the 1981 filing. Tr. 1714.

The Wisconsin rating bureau made another rate filing in 1982. In discussions with bureau representatives before the filing was submitted, the Wisconsin rate analyst stated, "[I]f you are talking about rate increases, you better be prepared to justify them." Tr. 1715. The analyst stated "that other members of the staff were reviewing [the rate filing]" (Tr. 1719), and he could "say with certainty [that he] reviewed the filing." Tr. 1757. After his review, he requested additional information from the rating bureau (RX 377, Tr. 1719-1720, 1757) which was submitted. The filing was later accepted. RX 378.

Once again, only by making a *qualitative* judgment concerning the regulatory activities of the state officials can the FTC argue that Wisconsin did not "review the

reasonableness of the rates established by the respondents." Pet. at 16. The finding in the FTC decision that the filings were checked "merely for mathematical accuracy," Pet. at 63a, mischaracterizes the record. The uncontroverted record contains abundant evidence of affirmative action by Wisconsin to review and approve the filed rates.

### C. Arizona and Connecticut.

As to the other two states where the active supervision requirement was in issue (Arizona and Connecticut), the petition argues that the Court of Appeals erred by refusing "to accept the Commission's appraisal of the evidence," but does not contend that this purported error warrants certiorari. Pet. at 20. The petition is at least correct in this concession; such a fact-specific question is plainly not appropriate ground for review. Moreover, no "substantial evidence" issue arises from the refusal of the Third Circuit to defer to the FTC's conclusion that there was a failure of active supervision in these two states. The FTC's conclusion resulted from erroneous application of its meaningfulness standard, tainted by the view that in assessing the existence of state supervision it could make its own evaluation of the quality of state supervision.<sup>12</sup> The Third Circuit did not reject the Commission's factual findings, but rather found that they "miss[ed] the point" that the quality of state supervision does not determine the applicability of the state action doctrine. Pet. App. at 37a.

<sup>12</sup> The Commission's lack of objectivity in these states was the subject of comment even by one of the Commissioners. In her dissent, Commissioner Azcuenaga observed that "the majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies." Pet. App. at 125a. In her opinion, "[t]he majority's reading of the evidence and application of the state action doctrine loads the dice heavily against the respondents." *Id.*



## CONCLUSION

For all these reasons, the case is not appropriate for review, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX

SUBSIDIARIES (EXCEPT WHOLLY OWNED  
 SUBSIDIARIES) AND AFFILIATES OF  
 STEWART TITLE GUARANTY COMPANY

American Surveying of New England  
 American Surveying of Texas  
 Associated Abstract Agency, Inc.  
 Bacalandata, Inc.  
 Blaine County Title  
 Citizens Title & Trust  
 Environmental Information Systems  
 Fleetwood Management Corporation  
 Intercounty Abstract Co. d/b/a  
 Stewart Title of New Hampshire  
 Island Title Corporation  
 Island Title Exchange, Inc.  
 Landata Inc. of Illinois  
 Landata Inc. of New England  
 Landmark Title, Inc.  
 Landmark Title Services Corporation (Denver)  
 Landmark Title Services Corporation (Colorado Springs)  
 Meyerdirk Title Co. (Kansas)  
 Nacogoches Abstract & Title Company  
 O'Rourke Title Co.  
 Old California Title Company  
 Peoples Title Agency, Inc.  
 Property & Equipment Management Service  
 SIT Investment Corp.  
 Stewart Escrow & Title Services of Lawton  
 Stewart-Fidelity Title Company  
 Stewart Holding Company  
 Stewart Metro Title Corporation  
 Stewart of Bayshore  
 Stewart of Lubbock, Inc.  
 Stewart-Princeton Abstract  
 Stewart Tax Service

Stewart Title & Trust of Phoenix, Inc.  
Stewart Title & Trust of Tucson  
Stewart Title Agency of Bergen County  
Stewart Title Agency of No. Jersey, Inc.  
Stewart Title Agency of Ohio, Inc.  
Stewart Title Company of Contra Costa  
Stewart Title Company of Michigan  
Stewart Title Company of Minnesota  
Stewart Title Co. of Palestine  
Stewart Title Delaware, Inc.  
Stewart Title of Aspen, Inc.  
Stewart Title of Birmingham, Inc.  
Stewart Title of Central Jersey, Inc.  
Stewart Title of Clearwater, Inc.  
Stewart Title of Columbia  
Stewart Title of Eagle County  
Stewart Title of Fort Lauderdale, Inc.  
Stewart Title of Fort Meyers, Inc.  
Stewart Title of Fresno County  
Stewart Title of Greater Washington, Inc.  
Stewart Title of Greeley, Inc.  
Stewart Title of Indianapolis, Inc.  
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Stewart Title of Montgomery County, Inc.  
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Stewart Title of Oregon  
Stewart Title of Pennsylvania, Inc.  
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Stewart Title of Rockport, Inc.  
Stewart Title of San Patricio County, Inc.  
Stewart Title of Sarasota  
Stewart Title of Tampa  
Stewart Title of Virginia  
Stewart Title of Western Suburbs, Inc.  
Stewart Title Orange County  
Texarkana Title & Abstract Co., Inc.  
Title Pro, Inc.  
Unique Exchange, Inc.



(4)  
No. 91-72

Supreme Court, U.S.  
FILED  
SEP 9 1991

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

---

**REPLY BRIEF FOR THE PETITIONER**

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1. Respondents assert (Br. in Opp. 13) that the petition “proposes a new and quite different standard—neither applied in [the FTC’s] own decision nor presented in its brief to the Court of Appeals.” *Ibid.* That assertion is incorrect.

In its opinion, the Commission described the active supervision requirement as follows:

[A] state official or agency must engage in affirmative, substantive review of the challenged conduct before active supervision can be found. Such review ensures that the state agency has consciously considered the anticompetitive consequence of the activity for which private parties seek approval. \* \* \* [n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency’s passive acceptance or non-substantive review of rate filings.” *Thus, we hold that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate.*

(1)

Pet. App. 55a (emphasis added) (quoting *New England Motor Rate Bureau, Inc.*, Dkt. No. 91-70 (F.T.C. Aug. 18, 1989), slip op. 15).

Similarly, the FTC's brief in the court of appeals summarized its holding as follows: "[T]he Commission held that the active state supervision requirement is met only where the state supervisory agency has authority to supervise the challenged private conduct and actually exercises that control by engaging in a review of the merits of the challenged conduct as part of a program of supervision." Gov't C.A. Br. 31 (emphasis added). Thus, the petition for certiorari, the FTC's brief in the court of appeals, and the FTC's opinion all adhere to the same essential standard: The active supervision requirement is met only if state officials actually determine that the particular private anticompetitive activity at issue is consistent with the State's regulatory policies.<sup>1</sup>

Respondents nevertheless contend (Br. in Opp. 5, 6-7), on the basis of two isolated statements in the Commission's opinion, that the Commission applied a "meaningfulness" standard, under which it "evaluated the merits and quality of state regulatory decisions." Considered in context, the Commission's statements merely emphasize the point that "meaningful" activity, for purposes of the active supervision requirement, consists of an actual determination that the private anticompetitive activity at issue meets the State's regulatory criteria.<sup>2</sup>

The Commission's reference to "meaningful" review in Wisconsin, read in context, refers to the requirement

<sup>1</sup> Even if the FTC had applied the wrong standard—which it did not—that would not justify the court of appeals in holding, on the basis of an *incorrect* standard, that respondents' activities are exempt from the federal antitrust laws. At most, the court of appeals would have been justified in remanding the case to the FTC for application of the correct standard.

<sup>2</sup> Respondents err in relying (Br. in Opp. 7) on statements in Commissioner Strenio's separate opinion. A separate opinion is not an opinion of the Commission. The fact that Commissioner Strenio, the author of the Commission's opinion, wrote a separate opinion expressing additional views of his own only emphasizes that obvious point.

that state officials actually determine whether the particular anticompetitive conduct at issue furthers the State's policies:

Inherent in the active supervision criterion is the notion that the review be meaningful. If review is not meaningful *because a state regulator fails or is unable to evaluate whether rates are "reasonable" as required by statute, then the rates are the product of private and not state action.*

Pet. App. 62a (emphasis added). The Commission explained that merely "checking rates for mathematical accuracy" is not sufficient to meet the active supervision requirement, and also noted that "nearly two dozen endorsements and amendments went into effect without being examined at all." *Id.* at 63a.<sup>3</sup>

2. Contrary to respondents' assertion (Br. in Opp. 5), petitioner's "real" challenge is to the legal standard adopted by the court of appeals. The court of appeals' version of the active supervision test spreads the cloak of antitrust immunity over private anticompetitive conduct that has not been approved by state officials so long as a state regulatory agency is staffed, funded, and engaged in "some basic level of activity." Pet. App. 28a.

Respondents contend (Br. in Opp. 10-13) that the Third Circuit's "some basic level of activity" test is not only "faithful to this Court's state action precedent" (*id.* at 5) but actually "goes beyond" it, *id.* at 13. This Court's cases, respondents argue (*id.* at 10-11), hold that the active supervision requirement is met if "state

<sup>3</sup> Similarly, the Commission observed that Connecticut "regulators could not meaningfully regulate a critical component of the rate-making process." Pet. App. 59a. As the context makes clear, that statement refers to the FTC's finding that Connecticut insurance officials "lacked the authority to control insurer expenses" as an element of ratemaking. Because Connecticut officials "did not 'exer[t] any significant control over' the terms of the restraint," *ibid.* (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987)), the FTC correctly concluded that respondents' price-fixing was not state action.



statutes grant authority for substantive review of regulated conduct." We disagree. It is true that the Court's decisions in cases such as *Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), rested in part on the Court's conclusion that state statutes did not confer authority to review the private anticompetitive conduct at issue in those cases. But it does not follow that the active supervision requirement is met simply because a state statute grants state officials regulatory authority. On the contrary, this Court has specifically required that state officials actually exercise the authority to review private anticompetitive conduct. See *Patrick*, 486 U.S. at 101 (state officials must both "have and exercise power to review the particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy"; state action doctrine exempts from the federal antitrust laws only those "particular anticompetitive acts of private parties" that, in the judgment of the State, actually further state regulatory policies) (emphasis added); *324 Liquor*, 479 U.S. at 345 n.7 (no state action unless state officials "exert[] \* \* \* significant control over" private anticompetitive activity).<sup>4</sup>

The court of appeals' toothless reformulation of this Court's state action test effectively abandons the active

<sup>4</sup> Contrary to respondents' assertions (Br. in Opp. 6, 9, 12 n.8, 13), nothing in this Court's opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), lends support to their position. In *Omni*, the Court declined to recognize a conspiracy exception to the state action doctrine because such an exception would require application of a vague "public interest" test or judicial "probing of \* \* \* official 'intent.'" *Id.* at 1352. Those concerns are inapplicable here, where the issue is simply whether state officials have determined that the private anticompetitive conduct at issue meets the State's regulatory criteria. The Court expressly noted in *Omni* that its decision "does not mean \* \* \* that the States may exempt private action from the scope of the Sherman Act." *Id.* at 1353.

The lower court decisions cited by respondents (Br. in Opp. 11 n.5) all were decided before *Patrick*, and thus lend no support to respondents' truncated version of the active supervision test.

supervision requirement, leaving in place only the companion requirement that the restraint be "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105. The result is a wholly unwarranted expansion of implied antitrust immunity, particularly where, as here, state officials are authorized, but not required, to review private anticompetitive activity.<sup>5</sup>

3. Respondents, having insisted that this case turns on whether the FTC applied the correct legal standard, then shift their ground to argue (Br. in Opp. 15-21) that the case turns on "a factual dispute between the FTC and the Court of Appeals." *Id.* at 15. That is incorrect. The FTC Act provides that the Commission's findings "as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). With respect to Wisconsin and Montana, the court of appeals' description of the facts did not differ appreciably from the facts as found by the Commission, and the court did not purport to reject any of the Commission's findings of fact or make any new findings of its own. Consequently, the facts as to those States are not "in dispute"—they are the facts as found by the FTC. In Montana, the FTC found that respondents' "rates \* \* \* went into effect without being examined." Pet. App. 76a. In Wisconsin, the Commission found that one filing was checked only for accuracy, another was given only "a cursory reading to the point that the supporting materials \* \* \* were not even checked for accuracy," and nearly two dozen filings were not examined

<sup>5</sup> Because state insurance officials are authorized, but not required, to examine every rate filed with the state agency, there is no basis for presuming (even rebuttably) that the officials have reviewed every rate. In fact, state officials do not review many rate filings, including those at issue in this case. Respondents assert (Br. in Opp. 11-12 n.7) that Wisconsin and Montana officials do not have "unfettered" discretion to review rates, because state statutes set out regulatory criteria and direct state officials to enforce those criteria. But a general duty to enforce the law is not the same as a duty to review every rate filing. As Wisconsin and Montana observe (see Wisconsin, Montana et al. Amicus Br. 17), "the insurance commissioner has the discretion to investigate insurance rates and determine whether further action is warranted."

at all. *Id.* at 63a, 199a, 200a. The issue before this Court is the legal significance of these findings, not whether they are correct.<sup>6</sup>

Respondents make two arguments, both invalid, in an effort to transform the legal question presented by this case into a factual dispute. First, respondents resort to extensive citations from the administrative record to conjure up alleged factual disputes. See Br. in Opp. 17-20. Indeed, at one point respondents simply assert (*id.* at 21) that a key finding of fact by the Commission “mischaracterizes the record.” The short answer to respondents’ arguments from the record is that, just as a court is not free to “make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences,” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)), respondents are not free to substitute their preferred interpretation of the evidence for the Commission’s findings.<sup>7</sup>

<sup>6</sup> The second question presented by the petition concerns whether the court of appeals properly deferred to the FTC’s findings of fact as to Arizona and Connecticut. But the Third Circuit’s application of its “basic level of activity” test to Wisconsin and Montana demonstrates that it does not require that state officials determine whether respondents’ price-fixing is consistent with state policy; the court reached the wrong legal conclusion on the facts it—and the FTC—found as to those two States. Thus, the first question presented by the petition does not depend on resolution of any factual dispute. The second question is presented in the overall context of this case, because proper deference by the court of appeals to the Commission’s factual findings concerning Arizona and Connecticut would have made the court’s erroneous legal standard determinative as to those States as well. Respondents’ statement (Br. in Opp. 15) that the FTC “seeks certiorari only as to Montana and Wisconsin” is flatly wrong. See Pet. 19-20.

<sup>7</sup> Moreover, respondents’ description of the record is one-sided. For example, respondents state (Br. in Opp. 18) that a copy of their rate filing in Montana was stamped “reviewed and filed.” In fact, the filing was stamped “reviewed and filed for informational purposes.” CX 41A. That certainly does not imply any determination that respondents’ price-fixing was consistent with the State’s policies.

Second, respondents repeatedly assert (Br. in Opp. 14) that “the Court of Appeals concluded that in each of the states at issue, the state regulators in fact ‘reviewed the reasonableness of title insurance rates’ pursuant to the standards of reasonableness set by state law.” See also *id.* at i, 5, 15. Respondents mischaracterize the court of appeals’ analysis. The court of appeals did not purport to reject the FTC’s factual findings that Wisconsin and Montana did not determine whether respondents’ rates were consistent with state policy. Instead, the court merely noted that “[i]n *Midcal* and *324 Liquor Corp.*, the Supreme Court articulated four factors that are pertinent in deciding whether a state actively supervises challenged conduct,” including “whether the state establishes the rates” and “whether the state reviews the reasonableness of the rates.” Pet. App. 27a (citing *324 Liquor*, 479 U.S. at 345; *Midcal*, 445 U.S. at 105). The court of appeals then adopted language from the First Circuit’s opinion in *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1990), as “most instructive on what type of showing is necessary to satisfy *Midcal*’s active supervision prong.” Pet. App. 27a. Because Wisconsin and Montana satisfied the Third Circuit’s gloss on *Midcal*—i.e., because a state agency with authority to regulate was staffed, funded, and “demonstrate[d] some basic level of activity”—the court of appeals concluded, as a matter of law, that the State both “established” the rates and “reviewed the reasonableness” of the rates (even if in fact no review of reasonableness actually occurred). Whether the Third Circuit’s gloss on *Midcal* is a correct modification of the governing legal standard is plainly a question of law, not a question of fact.<sup>8</sup>

<sup>8</sup> Respondents note (Br. in Opp. 15) that the FTC did not seek certiorari in *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990), even though that decision introduced the “basic level of activity” test applied by the court of appeals in this case. In *New England Motor Rate Bureau*, however, the First Circuit concluded, on the basis of the parties’ stipulations, that “the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory



4. Finally, respondents err in contending (Br. in Opp. 5-13) that the court of appeals' decision is required by principles of federalism on which the state action doctrine is based. Indeed, a decidedly contrary view of federalism concerns is powerfully set forth in the brief *amicus curiae* submitted by Wisconsin, joined by 32 other States, in support of the FTC's petition for certiorari. The States' brief in support of the petition argues, *inter alia*, that Wisconsin and Montana "do not provide for active review of the filed 'notices' of rates," States' Br. 9; that "Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees," *id.* at 10; and that consumers could not obtain a writ of mandamus from the state courts "because the insurance commissioner's duty to investigate and prosecute is wholly discretionary," *id.* at 18. The brief of the 33 States in support of the petition thus belies respondents' rosy reassurances that state officials reviewed and approved their price-fixing activity. In view of the position of a substantial majority of the States (including Wisconsin, Montana, and Arizona), it is manifest that only the foxes are insisting that they were not left to guard the henhouse.<sup>9</sup>

Respondents accuse the FTC of "overt animosity" to state regulatory regimes of collective rate filings and

criteria of the statute." *Id.* at 1077. Based on that view of the stipulations, the result reached by the court of appeals—although not the legal standard the court adopted—was correct. Since the court's interpretation of the particular stipulations in that case did not present a question warranting this Court's review, the government did not petition for certiorari. In this case, in contrast, there are no such stipulations or findings.

<sup>9</sup> Respondents' only reference to the States' brief is their statement, in a footnote, that the States "allege[] that Montana and Wisconsin do not authorize collective rate filing." Br. in Opp. 10 n.4. That is so, but the States also argue that "the facts relied upon by the court of appeals would not support a holding that the 'active supervision' prong of this Court's state action test had been met under *Patrick and Midcal*." States Br. 4.

"bias against the states' regulatory choices." Br. in Opp. 9 n.3. In fact, as the States' brief makes clear, it is the court of appeals' decision that will restrict the States' regulatory options by conferring immunity from federal antitrust laws on private entities whenever a state agency with authority to regulate engages in "some basic level of activity." The States would be discouraged from engaging in relatively modest regulatory programs that threaten to have such drastic and unintended consequences, to the detriment of the very consumers the States are concerned to protect. As the States observe, "[u]nwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct under federal antitrust law, state insurance law or other state regulatory schemes." States' Br. 3.

In short, respondents are correct that principles of federalism counsel "respect for state decision making." Br. in Opp. 6. But federalism does not require—and, indeed, is disserved by—expansion of the state action doctrine to cases in which the State has not determined whether private anticompetitive conduct is consistent with the State's policies.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR  
Solicitor General

SEPTEMBER 1991

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**In The**  
**SUPREME COURT OF THE UNITED STATES**  
**October Term, 1990**

FEDERAL TRADE COMMISSION,  
*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,  
*Respondent.*

BRIEF OF AMICUS CURIAE STATES OF WISCONSIN,  
ALABAMA, ALASKA, ARIZONA, ARKANSAS, IDAHO,  
IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND,  
MASSACHUSETTS, MICHIGAN, MINNESOTA,  
MISSISSIPPI, MISSOURI, MONTANA, NEVADA,  
NEW HAMPSHIRE, NEW JERSEY, NEW YORK,  
NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA,  
PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VERMONT,  
VIRGINIA, WASHINGTON, AND WEST VIRGINIA, IN  
SUPPORT OF PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,

*Respondent.*

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BRIEF OF AMICUS CURIAE IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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The States of Wisconsin, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia (hereinafter "Amici States") submit this brief in support of the Federal Trade Commission's petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in *Ticor Title Insur. Co. v. F.T.C.* (hereinafter *Ticor*), 922 F.2d 1122 (3d Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991). Review is warranted because the decision of the Third Circuit panel adopts a standard for the active supervision prong of the state action doctrine which

undermines state antitrust enforcement and which "conflicts with applicable decisions of this Court." Sup. Ct. R. 10(c).

### INTEREST OF THE AMICI STATES

The Amici States have a vital interest in preventing an unwarranted expansion of immunity from the antitrust laws. First, the attorneys general are the chief law officers of their states and are charged with the duty of enforcing the antitrust laws. As such, they are the primary public enforcers of the state antitrust laws, which are often interpreted in conformity with federal law.<sup>1</sup>

The attorneys general also represent their states and political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.<sup>2</sup> As the principal public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.

Respondent insurers conceded that the price-fixing agreements at issue here actually occurred and that they were unfair and anti-competitive within the meaning of section 5 of the FTC Act. *Ticor*, 922 F.2d at 1124. Immunizing such price-

<sup>1</sup> E.g., *Carl N. Swenson Co., Inc. v. E.C. Braun Co.*, 272 Cal. App.2d 366, 77 Cal. Rep. 378, 379-80 (1969); *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 219 A.2d 635 (1966); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). See also Mont. Code Ann. § 30-14-104 (1989); Utah Code Ann. § 76-10-926 (1991).

<sup>2</sup> 15 U.S.C. § 15(c) (1989); *State of Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972).

fixing agreements strikes at the heart of state antitrust enforcement.

The state regulatory regimes at issue here explicitly direct that the insurance commissioners rely on the competitive marketplace rather than regulate rates directly.<sup>3</sup> Unwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct under federal antitrust law, state insurance law or other state regulatory schemes. The attorneys general have a vital interest in maintaining the integrity of the process by which insurance transactions are accomplished. The novel exemption fashioned by the court of appeals invites price fixing by insurers in all lines of insurance despite clear state statutory language indicating a reliance on competition in such markets.

Moreover, the attorneys general are continually forced to weigh the need for antitrust enforcement in industries which often may be subject to some degree of state oversight. Expanding antitrust immunity would, thus, seriously impair antitrust enforcement in general.

The Amici States support the Federal Trade Commission's contention that the state action doctrine does not immunize the price-fixing agreements at issue here.

### SUMMARY OF ARGUMENT

The attorneys general ask the Court to grant the petition for certiorari for the following reasons:

1. In *Patrick v. Burget*, 486 U.S. 94 (1988), this Court explicitly conditioned the active supervision prong of the state action test upon a showing that the States "have and exercise power to review particular anti-competitive acts of private

<sup>3</sup> See, e.g., Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1989).



parties and disapprove those that fail to accord with state policy." *Id.* at 101 (emphasis added). The state's involvement must be sufficient to convert private anticompetitive action into that of the state itself. *Id.* *Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum.*, 445 U.S. 97, 106 (1980). The court of appeals departed from both this Court's standard and rationale, instead adopting a rule that "some basic level of [regulatory] activity" would be sufficient to meet the active supervision prong of the state action defense (Pet. App. at 28a).<sup>4</sup>

2. The court of appeal's decision is erroneous because the relevant state statutes expressly rely on competition to determine title insurance rates and search and examination fees. The filings of rating bureaus provide *notice* to regulators of rates that may be charged but do not establish joint rates. Indeed, agreements to charge specific fees are explicitly prohibited by state law. Far from being reviewed by state regulators, the agreements by title insurers to fix search and examination fees and to file rates jointly based in part on those fees, subverted the state regulatory scheme by making rate review impossible.

In acquiescing to the filings, the states did not authorize the price fixing which preceded the filing. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 554 n.26 (1978). State approval of one activity (*i.e.*, the filing of pooled rating information) is not state approval of a related but distinct activity (*i.e.*, classic horizontal price-fixing).

3. The court of appeals based its decision upon a stylized and selective choice of facts regarding state supervision in Wisconsin and Montana. However, even the facts relied upon by the court of appeals would not support a holding that the "active supervision" prong of this Court's state action test had been met under *Patrick* and *Midcal*.

<sup>4</sup> "Pet. App." refers to Appendix A attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit submitted by petitioner Federal Trade Commission.

4. The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active state supervision. *Ticor*, 922 F.2d at 1139-40. The extraordinary writ of mandamus cannot substitute for active state supervision. In Wisconsin and Montana, mandamus cannot remedy the price-fixing conduct or compel state officials to exercise their discretion. In any event, mandamus does not constitute active state supervision. Putting the burden on *consumers* rather than state officials to initiate review of the anticompetitive conduct directly contravenes the standard and rationale for state action immunity.

## ARGUMENT

### I. THE TEST APPLIED BY THE COURT OF APPEALS CONFLICTS WITH LONG-STANDING PRECEDENT OF THIS COURT.

Virtually every industry is subject to state oversight at some basic level, by at least one state agency. The scope of state oversight extends from licensing and regulation of the professions and quasi-professions, *see generally*, Mont. Code Ann. Title 37, *et seq.* (1989); Wis. Stat. ch. 440, *et seq.* (1989-90), and environmental regulation; Mont. Code Ann. Title 75 (1989); Wis. Stat. ch. 144 (1989-90), to worker safety regulation; Wis. Stat. ch. 50 (1989-90), Mont. Code Ann. §§ 70-73, 76-78 (1989); Wis. Stat. ch. 101 (1989-90), and intensive regulation of utilities; Mont. Code Ann. Title 69 (1989); Wis. Stat. ch. 196 (1989-90).

This Court has repeatedly stated that before private parties regulated by the states can enjoy immunity from federal antitrust liability, such parties must satisfy a two-pronged test determined by this Court. *Patrick v. Burget*, 486 U.S. 94, 100 (1988). First, the conduct must be undertaken pursuant to a



"clearly articulated and affirmatively expressed" state policy to displace competition with regulation. Second, the anti-competitive conduct must be "actively supervised by the state." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Alum.*, 445 U.S. 97, 105 (1980).

This Court explicitly conditioned the active supervision prong upon a showing that the states "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 101 (emphasis added).<sup>5</sup> The rationale for this standard is that "[w]here a private party is engaging in the anti-competitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). The state's involvement must be sufficient to convert private anticompetitive action into that of the state itself. *Patrick*, 486 U.S. at 105; *Midcal*, 445 U.S. at 106.

The court of appeals ignored this controlling precedent and substituted the following standard:

Where . . . the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not

<sup>5</sup> The Federal Trade Commission rejected, on the basis of extensive findings of fact, the state action defense of the title insurers as to six states. Pet. App. at 42a. The court of appeals reversed and vacated the decision of the Federal Trade Commission. This brief focuses on Wisconsin and Montana because the FTC's petition for *certiorari* treats them as leading examples of the erroneous analysis of the state action defense by the court of appeals. The case, however, has implications for state regulation and antitrust enforcement far beyond these two states.

simply their own policy, more need not be established.

*Ticor* at Pet. App. 28a (quoting *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) ("NEMRB")).

In sharp contrast to this Court's decision, *Midcal* and *Patrick*, which conditioned state action immunity for private parties on a review of "the particular anticompetitive acts of private parties," the court of appeals adopted what amounts to little more than a "bodies, buildings and budget" standard. Even where the state has not reviewed the anticompetitive conduct, and even where the state statutes themselves rely on competition, rather than regulation, to set rates, the mere presence of a state regulatory regime could provide antitrust immunity for unreviewed activities that would otherwise be *per se* unlawful under the antitrust laws.

Indeed, the lower court's standard, may, if not reversed by this Court, enable private parties in many industries subjected to "some basic level of [regulatory] activity" to claim state action immunity from federal antitrust liability. Thus, the decision below, if unreviewed, may have an impact on virtually all private conduct that is remotely affected by state regulation. For this reason alone, the Court should grant the Commission's petition for *certiorari* and reverse and remand this case with directions that the court of appeals apply the active supervision prong enunciated by this Court in *Patrick*, *Midcal* and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

**II. THE CIRCUIT COURT'S DECISION IS ERRONEOUS BECAUSE MONTANA'S AND WISCONSIN'S INSURANCE REGULATORY SCHEMES RELY ON COMPETITION TO SET RATES AND, HENCE, DO NOT PROVIDE FOR ACTIVE STATE REVIEW.**

The court of appeals misapprehended the purpose of the joint filing by rating bureaus when it stated: "Once the title insurance rating bureau establishes the uniform rate for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services." *Ticor* at Pet. App. 12a. However, nothing in the Montana and Wisconsin statutes suggest that the information filings of the rating bureau "establishes" rates. To the contrary, as indicated below, the statutes prohibit agreements among insurers to charge any rates or fees.

**A. Title insurers in Montana and Wisconsin are expected to set title insurance rates competitively and to submit filings for the limited purpose of giving insurance commissioners "notice" of rates being charged.**

Insurers are required to give "notice" to the insurance commissioner of the rates they charge. Mont. Code Ann. § 33-16-203(1) (1989); Wis. Stat. § 625.15 (1989-90). An insurer may discharge this obligation by developing its own cost data or by relying upon a filing by a licensed rate service organization ("rating bureau"), with "such modification for its own expense and loss experience as the credibility of that experience allows." Mont. Code Ann. § 33-16-203(1) (1989); Wis. Stat. § 625.15(1) (1989-90). Rating bureaus are permitted to exist so as to make more efficient the collection and pooling of claims and expense data against which individual insurers can price their product

on a competitive basis. Mont. Code Ann. § 33-16-202(2)(3) (1989); Wis. Stat. § 625.01 (1989-90).<sup>6</sup>

Nothing in the insurance statutes of Wisconsin and Montana compels or authorizes price fixing by title insurers of search and examination fees.<sup>7</sup> To the contrary, these states rely upon competition to set title insurance rates and, consistent with that reliance, do not provide for active review of the filed "notices" of rates. Far from condoning price fixing, the insurance statutes of Wisconsin and Montana *explicitly prohibit* agreements among insurers to use or adhere to rates. *E.g.*, Wis. Stat. § 625.33 (1989-90); Mont. Code Ann. § 33-16-303 (1989).<sup>8</sup> Moreover, insurers are expected to decide, unilaterally, what rates they will charge based upon "average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows." *E.g.*, Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1989). The reliance

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<sup>6</sup> For example, the purposes of the rating bureau statute include:

(a) To protect policyholders and the public against the adverse effects of excessive, inadequate or unfairly discriminatory rates;

(b) To encourage, as the most effective way to produce rates that conform to the standards of par. (a), independent action by and reasonable price competition among insurers.

Wis. Stat. § 625.01(a) and (b) (1989-90).

<sup>7</sup> The clear articulation prong of the *Midcal* analysis is not at issue in this case. However, an understanding of state regulatory policies is relevant to active supervision.

<sup>8</sup> The 1969 Committee Comment dealt with this issue explaining: "*Rates may be made individually or collectively by bureaus, but agreements to adhere to bureau rates are prohibited.*" Wis. Stat. Ann. ch. 625 (1960) (Committee Comment at 5) (emphasis added).



on competition to set rates and related expenses is underscored by the Committee Comment to the 1969 revisions to the Wisconsin insurance statutes: "Of course, a competitively oriented rating law such as this one will not provide for active regulatory intervention to ensure what this section directs, but it sets the standard and relies mainly on competition to achieve the goal." Wis. Stat. Ann. § 625.15 (1969) (Committee Comment). See also, Mont. Code Ann. § 33-16-101(2) (1989).<sup>9</sup>

Although the Wisconsin Legislature recognized that there might be situations in which "price competition is replaced by price fixing in concert," Wis. Stat. Ann. § 625.15 (1969) (Committee Comment), the Legislature's move to the new system was premised on the assumption that insurance markets operate competitively. Consistent with this premise, the statutes provide that: "Insurers can use the rates they choose. No approval is required, and a filing is required only for information and after the fact." *Id.*

Given the laissez faire structure of insurance rate regulation described above, it is understandable why, for example, Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees: they relied on competition to determine

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<sup>9</sup> Indeed, the underlying premise of the 1969 revisions in Wisconsin's rating bureau statute underscores the emphasis the state placed on insurer competition to set rates, not direct regulation: "The existing [much more rigid and comprehensive] system of rate regulation has been rendered unnecessary through the development of a strikingly greater degree of meaningful price competition in many of the most important lines of insurance." Wis. Stat. Ann. ch. 625 (1969) (Committee Comment). The Wisconsin legislators concluded that this change in industry attitudes and practices together with enumerated defects in "[r]ate regulation in the traditional manner," "call for a system of rate control which eliminates the requirement that rates be reviewed by the commissioner before use." *Id.*

rates because their state insurance statutes expressly state that competition shall determine rates.<sup>10</sup>

### B. The price-fixing would have made rate review impossible.

Even if the state regulatory structures had not relied on competition to set rates, and even if the state regulators had actively reviewed the rates, such review would have been ineffective because the figures reported for search and examination fees on the filings reflected *price-fixed* search and examination fees, not a compilation or average of fees each

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<sup>10</sup> The record of this case could not be clearer that such rates were not reviewed. For example, the FTC noted that Wisconsin had never examined the title insurance rating bureau, never had a hearing on any insurance rate filing in any line of insurance, never issued a rate suspension order, did not have the resources to review rates and, in general, "Wisconsin followed a hands-off policy in dealing with title insurers." *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446 (F.T.C. 1989) (quoting testimony of Wisconsin regulators).

The FTC reported that a key Wisconsin official had testified that:

Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?

A. No.

Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?

A. Yes.

*Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446 (F.T.C. 1989).



company expected to incur. Such price fixing undermined the ability of state regulators to review the reasonableness of the related rates on a state specific basis by distorting the market price for the fixed search and examination services.

The statements that insurers in Wisconsin and Montana are required to file with their respective insurance commissioners, see Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1989), must include information regarding risks, expenses and profits. See Wis. Stat. § 625.12 (1989-90); Mont. Code Ann. § 33-16-201 (1989). State law presumes that insurers incur costs and expenses in a competitive marketplace. See, e.g., Wis. Stat. § 625.11 (1989-90); Mont. Code Ann. § 33-16-201 (1989).

Any attempt to determine whether or not rates or fees are excessive must include a comparison of the filed rates with rates and fees charged by insurers in the competitive market. If fees have been artificially inflated, excessive profits can be made to appear "acceptable." Distorting the market for costs thereby impairs any attempt to review the performance of insurers. Indeed, the passive, non-reactive regulatory structure and performance in these two states, as outlined by both the court of appeals and the FTC, *Ticor Title Insur. Co. v. F.T.C.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446, 22,450-51 (F.T.C. 1989), is logical given the reliance of the states generally on competitive markets for determining the level of title insurance rates.

As in *St. Paul*,<sup>11</sup> there is no indication here that in acquiescing to the "notice" filings, Wisconsin and Montana authorized the fixing of search and examination fees. *Id.* at 554 n.26. State acquiescence in one activity (i.e., the filing of pooled rating information) is not state review, much less approval, of the separate and distinct activity (i.e., classic horizontal price fixing of underlying expenses in that filing). See generally *In re Insur. Antitrust Litig.*, 7 Trade Reg. Rep. (1991-1 Trade Cas.) (CCH) ¶ 69,460 (9th Cir. June 18, 1991); *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir. 1990); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988).

The respondent insurers have failed to provide any evidence that the relevant states supervised or approved the agreement to fix title search and examination fees. Further, that agreement was neither a reasonable nor a necessary consequence of filing collective rate schedules and, in fact, would have subverted effective rate review had it been attempted. Private parties who subvert the regulatory process ought not to enjoy immunity emanating from that process. Accordingly, the respondent insurers' agreement to fix search and examination fees is neither state action nor immune from federal antitrust regulation.

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<sup>11</sup> In *St. Paul*, 438 U.S. 531, 554 n.26 (1978), the Court assumed that policy form changes desired by insurers had been filed with the state insurance director. However, even though Rhode Island acquiesced to the filing of these policy forms, there was no indication that Rhode Island had "authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *Id.* Hence, even though the state had received and approved the policy forms at issue in *St. Paul*, state action immunity was not available to the defendant insurers there.

### III. EVEN THE FACTS FOUND BY THE COURT OF APPEALS FAIL TO SATISFY THE ACTIVE SUPERVISION PRONG.

In order to apply this Court's standard for active supervision, the Court need not embark upon an extensive review of the states' regulation of title insurance. Even the facts presented by the court of appeals provide no basis for a holding that either Wisconsin or Montana has exercised the power to review the private price fixing of respondent title insurers. *Patrick*, 486 U.S. at 101.

First, the court of appeals noted that both Montana and Wisconsin allowed unreviewed, collectively-formulated rates to be used prior to filing. *Ticor*, 922 F.2d at 1139-40. Moreover, the insurance regulators in Montana and Wisconsin are not required to hold a hearing or to examine the filings. *See, e.g.*, Wis. Stat. §§ 601.41(5) and 601.43(1) (1989-90); *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 786 P.2d 1199 (1990). Finally, the regulators in Montana and Wisconsin, according to the court of appeals, did no more than (1) receive submissions for filing; (2) check some of them for mathematical accuracy; and (3) make certain inquiries regarding geographic scope and supporting data. Many inquiries went unanswered at all, or unanswered for several years. *Ticor*, 922 F.2d at 1139-40 n.16.

Nothing in the decision of the court of appeals or in the record before the FTC suggests that either state reviewed the collectively set and enforced title search and examination fees to determine if they were "excessive, inadequate or unfairly discriminatory." *See, e.g.*, Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(a) (1989). Indeed, such a review would likely be unavailing where the insurance regulators would have no reason to believe that the search and examination prices they were reviewing had been price fixed. Such acquiescence is understandable because states such as Wisconsin and Montana rely primarily on *competition*, not

regulation, to determine the appropriate level of rates charged by insurers participating in rating bureaus.<sup>12</sup>

### IV. THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT SUBSTITUTE FOR EFFECTIVE STATE SUPERVISION.

The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active state supervision. *Ticor*, 922 F.2d at 1139-40. The court of appeals' reliance on mandamus both misapprehends state law and contradicts the sound prior policy of this Court.

#### A. Placing the burden of enforcing state policy on consumers circumvents the policy underlying the state action doctrine.

The availability of mandamus does not constitute active state supervision. Active state supervision ensures that the state action doctrine shelters only the particular anti-competitive acts of private parties that actually further state regulatory policies. *Town of Hallie*, 471 U.S. at 46-47 (1985). The court of appeals' decision to substitute mandamus for "active

<sup>12</sup> "On the whole, the insurance market is fairly competitive, and attention directed to making it more so will be more rewarding than effort directed to the regulation of particular rates." Wis. Stat. Ann. § 625.01 (1969) (Committee Comment). "It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise." Mont. Code Ann. § 33-16-101 (1989).



state supervision" takes the burden of initiating review from the state. As there is no guarantee that consumers or others will act to protect the policies and interests of the state, reliance on mandamus vitiates the policies underlying the state action doctrine.

Additionally, federal and state antitrust laws provide for treble damages to parties injured by antitrust violations. See 15 U.S.C. § 15 (1989); Wis. Stat. § 133.18 (1989-90); Mont. Code Ann. § 30-14-133 (1989). Treble damages provide private litigants with an incentive to supplement governmental enforcement of the antitrust laws. See *Gerol v. Arena*, 127 Wis. 2d 1, 377 N.W.2d 618 (Ct. App. 1985). Relief through mandamus provides no such incentive. See, e.g., *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 100 (1981); *State ex rel. Butte Youth Serv. Center v. Murray*, 170 Mont. 171, 173-74, 551 P.2d 1017, 1019 (1976). By placing the duty to enforce state policy in the hands of consumers while removing the incentives provided by antitrust statutes, the court of appeals nullifies the policies and protections underlying the "active state supervision" requirement. To jeopardize the national policy in favor of competition in the face of such a gauzy cloak of state involvement runs counter to sound policy. 324 *Liquor Corp.*, 479 U.S. at 343 (1987); *Midcal*, 445 U.S. at 105.

**B. Mandamus is inappropriate to compel the insurance commissioner to regulate insurance rates as any arguable authority to investigate lies within the discretion of the Commissioner.**

The remedy of mandamus is drastic, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967). It is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion. See, e.g., *Law Enforcement*

*Standards Bd.*, 101 Wis. 2d at 494, 305 N.W.2d at 100; *Butte Youth Serv.*, 170 Mont. at 173-74, 551 P.2d at 1019 (mandamus is inappropriate to compel the performance of a discretionary function).

In Montana, the insurance commissioner has the discretion to investigate insurance rates and determine whether further action is warranted. *Gerber*, 242 Mont. at 372, 786 P.2d at 1201. Following an extensive review of the Montana code,<sup>13</sup> that the *Gerber* court determined that the insurance commissioner's investigative and prosecutorial discretion rivaled that of a prosecutor and warranted quasi-judicial immunity. *Id.* Accordingly, a writ of mandamus would not issue to compel the performance of a discretionary act.

Wisconsin has similarly placed certain powers within the discretion of the insurance commissioner.<sup>14</sup> Where authority is

<sup>13</sup> E.g., Mont. Code Ann. § 33-1-311(1) (1989): "[T]he commissioner MAY conduct such examinations and investigations . . . as [she] may deem proper"; Mont. Code Ann. § 33-1-701(1) (1989): "[T]he commissioner MAY hold hearings for any purpose within the scope of this code deemed by [her] to be necessary"; Mont. Code Ann. § 33-1-317 (1989): "[T]he commissioner MAY after having conducted a hearing pursuant to § 33-1-701, impose a fine"; Mont. Code Ann. § 33-1-318 (1989): "[W]henEVER IT APPEARS TO THE COMMISSIONER that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, she] MAY . . . issue an order directing the person to cease and desist." Mont. Code Ann. (1989) as cited in *Gerber*, 242 Mont. at 369, 786 P.2d at 1199 (all emphasis from opinion).

<sup>14</sup> See, e.g., Wis. Stat. § 601.41(5) (1989-90): "The commissioner MAY at any time hold . . . hearings . . . for the purposes of investigation . . . ." Wis. Stat. § 601.43 (1989-90): "WHENEVER THE COMMISSIONER DEEMS IT NECESSARY in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner MAY examine the affairs and condition of . . . any person or organization of persons doing . . . insurance business in this state . . . ." Wis. Stat. § 625.21 (1989-90): "IF THE  
(continued...)"



combined with specific grants of discretion, a regulator's discretion to investigate is very broad. *See, e.g., Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988) (municipal officers have no legal obligation to prosecute all cases in which an individual commits a violation of municipal ordinances . . . even when open and flagrant). *See also Gerber*, 242 Mont. at 372, 786 P.2d at 1201. ("Like the prosecutor, the [insurance] commissioner has the discretion to investigate and determine whether further action is warranted.")

Accordingly, mandamus is unavailable to aggrieved persons because the insurance commissioner's duty to investigate and prosecute is wholly discretionary. *Vretenar*. Mandamus is also improper because "it would be unavailing, nugatory, or useless [and] its issuance would constitute an idle act." *Heider v. City of Wauwatosa*, 37 Wis. 2d 466, 482, 155 N.W.2d 17, 25-26 (1967).

Failing to recognize the discretionary nature of the insurance commissioner's power, and the impropriety of a writ of mandamus to compel these discretionary duties, the court of appeals erroneously concluded that mandamus was a proper mechanism to force "active state supervision." *Ticor*, 922 F.2d at 1139-40. As mandamus is highly inappropriate, the Third Circuit Court of Appeals' decision to grant state action immunity to the respondent title insurers must be reversed.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition of the Federal Trade Commission for a Writ of Certiorari.

Respectfully submitted by,

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<sup>14</sup>(...continued)

COMMISSIONER FINDS that competition is not an effective regulator of rates . . . he or she MAY promulgate a rule." (Emphasis added.)

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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**JOINT APPENDIX**

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- Jan. 7, 1985 —Federal Trade Commission Complaint issued.
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- Dec. 22, 1986 —Initial Decision of Administrative Law Judge.
- Sept. 19, 1989 —Final Order and Opinion of the Federal Trade Commission.
- Dec. 15, 1989 —Respondents' Petition for Review filed in United States Court of Appeals for the Third Circuit.
- Jan. 9, 1991 —Opinion of United States Court of Appeals.
- Mar. 12, 1991 —Court of Appeals' denial of Federal Trade Commission's petition for rehearing and suggestion for rehearing *en banc*.
- July 10, 1991 —Petition for writ of certiorari filed.
- Aug. 23, 1991 —Brief of *Amicus Curiae* States of Wisconsin, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia for a Writ of Certiorari filed.

**TESTIMONY OF LEONARD C. DONOHUE**  
**JUNE 10, 1986**

\* \* \* \* \*

[1610] Q. Mr. Donohue, please state your name for the record, if you will, sir?

A. My name is Leonard C. Donohue.

Q. By whom are you employed, sir?

A. I am employed by Chicago Title Insurance Company.

Q. What is your position with Chicago Title Insurance Company?

A. I am senior vice president and general counsel for the company.

\* \* \* \* \*

[1615] Q. Had you received information from the department to the effect that rate justification would be required by title insurers in Wisconsin?

A. Yes, I had. We were latecomers in the insurance industry. In the '50s there was probably only two underwriters writing early on, a predecessor company that I referred to and, I believe, an agency of Lawyer's Title. In the '60s there were perhaps 10 or 12 underwriters. We were maturing. The department was looking at us more and more like insurance, like a true insurance company. And they expected rate justification, statistical data to support the charges that we were making and they so advised us.

\* \* \* \* \*

[1618] Q. Now, had you had any contacts with any insurance department officials prior to the time this filing was made?

A. We would have had contact between June of '68, [1619] the exploratory organizational meeting, and April of '71 when we made the first rate filing on a fairly regular basis. Through our counsel, our counsel being counsel for the rating bureau, one Richard Buellesbach of Milwaukee, we had submitted Articles of Association to the department for approval. And that went on for

a period of time until the department was satisfied with the document that they ultimately accepted. There were those contacts with the legal area.

There were subsequent contacts with Mr. Kennedy on their expectations both of a filing and their subsequent expectations of statistical support, rate justification information.

Q. Now, what were their expectations with respect to statistical support, rate justifications?

A. Well, basically that we adhered to and comply with the statutory provisions in the State of Wisconsin relating to the submission of statistical information. And since we were pioneering in this line of insurance, Mr. Kennedy's counsel was to the effect that he would accept our initial filing subsequent to the submission following some experience of statistical information justifying the rates that we were charging.

He alluded early on to the fact that we obviously had no experience because we had just filed the [1620] rates. He indicated that he would accept those paralleling that at the time to a line of snow mobile insurance. I gather snow mobiles were new in 1968 or relatively so. He said he accepted whatever their filing was with the expectation that experience would follow in the way of statistical justification.

Q. So do I understand you correctly to say that what you were hearing was that the filing would be accepted subject to the subsequent filing of rate justification statistics?

A. Exactly.

Q. And you had made it clear before the filing that the filing was going to be a filing of basically historical rates as I understood you?

A. That's right.

Q. Did any insurance department officials give any indication of what would be done with the filing once it was received by them?

A. Mr. Kennedy indicated that he would peruse it, evaluate it and advise us accordingly.



Q. Did that happen as far as you know?

A. He accepted the filing and again on the conditions that he had set forth, that we follow up in due course with experience.

Q. Let me call your attention to the next exhibit, [1621] if I can, which is RX-302. Do you have that?

A. Yes.

Q. The first two paragraphs of that appear to reflect conversations that you had with Mr. Kennedy. Would I be correct about that?

A. That is right.

Q. And according to your note here, he is telling you that he would carefully review the filing when it was made?

A. Yes.

\* \* \* \*

[1626] Q. Now, you mentioned before that the department [1627] had expected the rate bureau to develop statistical support for the rates that had been filed.

A. Yes.

Q. How did the bureau proceed to accomplish that or maybe I should ask you first, did it?

A. We did it. There was considerable, I guess, probing early on as to the type of statistical data that we could and should submit. The history of some of this would be that unlike other, say, P.C. companies, the companies in our line of insurance each had their separate accounting systems for the booking of revenue. And those systems did not at that time, anyway, necessarily break down title revenues by level of risk nor by product line nor the type of things that would normally be included in a statistical plan conventional for P.C. companies.

We had to identify how best we could satisfy the department and gather data. We had to find the individual or entity that could design such a plan for us. And as competitors who had never shared anything with

each other, we had to break down some laws of resistance there, i.e., we had to find the common collection tool for the collection of the data desired by the commissioner and it took a period of time.

Q. Let me refer you to RX-318, which is a letter of [1628] October 1974 from Irving Plotkin to Robert Mitchell, who I guess is still president of the rate bureau at this point.

And does this letter reflect the fact that Arthur D. Little had been retained by the bureau to develop this statistical data?

A. Yes. The direction we ultimately took was to retain one Dr. Irving D. Plotkin of Arthur D. Little, Inc. to design the statistical and an income and expense plan for us. We were aware of the fact that Plotkin had done work in other states for the industry and for the insurance departments in furtherance of this very thing.

\* \* \* \*

[1640] JUDGE NEEDELMAN: Just a moment. I don't quite follow that, Mr. Donohoe. Why does the existence of the Plotkin effort bear on whether 3.33 was adopted or not? I am not sure I follow that. I wish you would explain that.

THE WITNESS: I can offer my thoughts on it. The primary thing in my judgment that the department wanted from their proposed 3.33 was to get our industry's attention and accelerate or jack up our effort to get our statistics together and submit them to the department in furtherance of rate justification.

In my judgment, I think the proposed maximums on search and examination were simply intended to get that [1641] attention. I am not sure the department itself really, really believed that that was a meaningful proposal.

\* \* \* \*

[1646] Q. Do you have any recollection of what happened after this filing, this 1981 rate filing was made?

A. My activity with the bureau was somewhat lessened at that time because of some of the other responsibilities that we covered in qualifying statements early on. The commissioner was Susan Mitchell and a party by the name of John Keegan had succeeded Louis Hannes as director of that bureau of rates and forms.

Keegan was totally unfamiliar with title insurance and wanted to bring himself up to speed as soon as possible. And my recollection is that we, we being Mr. Buellesbach, our counsel, and one George Hursig of Chicago Title, then a Chicago Title insurance specialist in rate regulation, and Donald Grabski, who would then have been president of the rating bureau, all met with Keegan and his subordinate, Mr. Wirtz, to discuss where we had been historically in furtherance of rate development and rate justification.

Q. This is the meeting that is reflected by RX-369, which is the next exhibit?

[1647] A. Yes. My best recall is that I attended the meeting with Keegan primarily as a charter member of the bureau in its initial development of rates and forms filings. The exhibit you just referred to, RX-369, is a follow-up letter to that meeting wherein I forwarded to Mr. Keegan some of the matters previously submitted to the department which he would have had there but with which we could put our hands on easier. I sent him some historical background.

Q. This appears to be primarily requests for matters that would go to rate justification, is that a fair assumption?

A. That's right.

Q. Was Mr. Keegan concerned about that in the context of this 1981 rate filing?

A. I don't recall that he was concerned. He wanted to know more about it and I believe my follow-up letter, RX-369, encloses the initial plans that Dr. Lipshutz sub-

mitted and that Mr. Hannes okayed conditionally and some subsequent correspondence to the department on reaching a consensus on those Arthur D. Little plans as the appropriate vehicles with which we could gather statistical and income and expense information.

\* \* \* \* \*

[1676] JUDGE NEEDELMAN: Well, my recollection, as I am sure is muddy by this time, is that what Arthur D. Little did for you in Wisconsin and perhaps for other rating bureaus was to examine income and expense data and then propose what are considered to be a fair rate of return based upon capital investment. Is that correct?

THE WITNESS: That's correct.

JUDGE NEEDELMAN: My question to you is how did a rate evolve from the Arthur D. Little submission?

THE WITNESS: The rates, proposed rates were initially developed by committee activity among member companies and these rates were put down in some format and given to Arthur D. Little. And they were asked: From what you know, ADL, about the industry book of business in Wisconsin last year and the year before, what will this do for us next year in the way of a rate of return? And they would respond in report form that they would submit to the department. And I believe that formal process of prospective profitability probably [1677] began with the 1981 manual we touched on.

\* \* \* \* \*

## TESTIMONY OF DONALD R. GRABSKI

JUNE 10, 1986

\* \* \* \* \*

[1686] Q. Will you please state your name, sir?

A. Donald E. Grabski.

Q. By whom are you employed, Mr. Grabski?

A. Lawyers Title Insurance Corporation.

Q. What is your position with Lawyers Title?

A. I am vice president, multi-state manager.

\* \* \* \* \*

[1704] Q. So what reaction did you get when you were informing Mr. Wirtz about this anticipated filing?

A. Well, his reaction to the filing of the manual was in a positive nature. However, when we talked about increasing rates, he seemed to be very adamant about we were going to have to have some support of justification for it because the department was not about to okay increases in rates just offhand.

Q. Now, did anything else happen that you recall between that discussion or those discussions and the filing itself? Let me ask you, do you recall any further conversations with any department officials before the filing was actually made?

A. We had several discussions. I cannot remember [1705] exactly because of the generalness of the visits whether or not I talked to Mr. Keegan, who may or may not have been present when I would visit the department. Generally if he was in the area, Mr. Wirtz would ask if we would like to all get together to discuss whatever we were discussing. And at this time they seemed to be very direct about the fact that they needed substantiation for new rates.

Q. During the two-year period or so that you were president of the rate bureau, was it your practice to make periodic stops to the insurance department in Madison?

A. I think between phone calls and visits, probably I would say anywhere from three to five times a month I would be either in the office or talking to them on the

phone. I did this even preliminarily when I was a delegate, just for the company. But I continued it on after I became the president. I felt that it gave us a much better insight and a much better measure of what their expectations were if we knew it up front rather than to throw something at them and wait for their reaction.

Q. Did you always have a specific purpose for that kind of contact?

A. In some instances I would say that after I [1706] became president, it was usually a specific—although I still had reason to be there as a representative of our company to determine what deviations had been filed by other companies to find out if there was any general information that may impact us as an individual company and/or the rate organization. So that our conversations were quite numerous.

Q. Well, after this 1981 filing was made, did you get any word with respect to its acceptance or whatever or not?

A. Well, I had called several times because there seemed to be a delay after they received it and asked if there was any problem with it because we hadn't had a response. And in telephone conversations Mr. Wirtz had indicated that he really didn't know what the results would be, if it was being studied by their staff and by their staff counsel and that he would get back.

He didn't think there was any problem but he wasn't sure because they hadn't finished their report. I think there might have been an occasional two or three telephone calls at that time to try to find out what if anything was wrong with the filing.

\* \* \* \* \*

[1707] Q. Let me ask you to refer to the next exhibit, which is RX-367. It appears to be a letter from John Keegan to you dated April 8th. Does that also refer to this February 1981 rate filing?



A. Yes. Mr. Keegan had, prior to this letter, I [1708] believe, called me to advise me that he had some very strong feelings about what we had presented particularly in the rate increase area and that they felt that they really were going to scrutinize this and that because of the rate increases and the information that was submitted with the manual, that they could very well be calling for a hearing on the matter unless they could gather sufficient documentation to offset their attitude about a hearing.

\* \* \* \* \*

[1709] Q. Your letter to Keegan dated April 16, 1981?

A. Right.

Q. You testified and your letter says that you suggest an informal meeting. Did that meeting take place?

[1710] A. Yes, it did.

Q. Who attended that meeting, if you recall?

A. I think we had several attempts to arrange a meeting and when we finally did, because of the participants, we met in the commissioner's office. I believe there was Mr. Wirtz, Mr. Keegan, Mr. Van Cleave, I believe, myself, Mr. Donohoe and Mr. Hursig, as representatives of the bureau.

Q. Do you recall what the discussion was at that meeting?

A. At the outset Mr. Keegan seemed in control of the meeting. He seemed to direct the inquiries of the questions with support from Mr. Wirtz where I think he felt he was in a weak area on this question.

He was primarily raising the question of the rate increases, the form of justification that we had included or we thought we had included in the filing.

We had attempted to more or less explain the whole manual to him so that he would be clear in understanding of what we were attempting to do. So with that we walked him through the manual and then, of course, his questions pursued the rate increases and the method for substantiating them.

At that point he felt that he ought to have more financial data to support the rates as we had presented [1711] them. Again, this was a filing on our own in the department and not with the assistance of any outside help. So that we probably were a little remiss in some of the information we should have included in there to give a more substantial background.

I think we had submitted two years of financial information and he said he needed five years.

\* \* \* \* \*

[1712] Q. And what happened after this meeting, do you recall?

A. As I recall Mr. Donohoe did go back to his office and his files and contacted those parties at A.D. Little or was able to obtain communications and correspondence from them that he, in turn, had promised and submitted same to Mr. Keegan, which was in response to his inquiry.

Q. Would what you just said be reflected by RX-369, which is the next exhibit, the letter we have seen before today from Mr. Donohoe to Mr. Keegan of June 1, 1981?

A. Yes.

Q. After this material was submitted by Mr. Donohoe's letter, what happened, do you recall? Was there further contact with the insurance department?

A. Well, yes, there was. To the question of whether or not that satisfied their inquiry, I was told directly that it was under consideration. It was being [1713] reviewed by staff. They were consulting with their attorney. They were not certain that what we had submitted was sufficient for them to give an acceptance on but that they would let us know later.

Q. Now, do you recall there being a later meeting at the insurance department about this filing?

A. Yes. We had arranged after the submission to return to the department in an attempt to, again, find

out if there was anything specifically that they were objecting to that we had not responded to.

Q. Do you recall when that meeting occurred?

A. I can go by reference of an office memo.

Q. Let me ask you to refer to RX-371, if you will, which you should have in front of you.

A. This is dated August 4th, 1981.

Q. Does that refer to the meeting that you just testified to?

A. Yes. This was the second meeting in which myself and Mr. Hursig attended and I want to believe it was in July—it had to be prior to this date—in which we again presented ourselves to Mr. Keegan and Mr. Wirtz to review the information submitted and to afford them the opportunity to ask or to require any additional information that they felt they needed to support the rates.

[1714] Q. There is a reference in this memo to the fact that the commissioner was 95 percent convinced that the filing were acceptable. I gather there was still some outstanding reservation about it. Do you recall what that was?

A. Well, it was my feeling they didn't want to commit to the fact that they may or may not accept them but I had the impression that they felt that they were getting the information they wanted to satisfy their inquiry. However, they may not have had it all at that time.

Q. Well, it is now August of 1981 and you are still talking about a February 1981 filing. What was the bottom line on all this? Did it ever get approved or accepted or whatever?

A. Eventually it was approved. I believe my first acknowledgment from the department was a phone call from Mr. Wirtz stating that they felt that they had the information they needed and that Mr. Keegan would either contact me direct or he would advise Mr. Wirtz that it was accepted and, therefore, that we could go ahead and apply the rates.

Q. Mr. Grabski, let me ask you to refer now to RX-374, which is the next exhibit, which is a letter from you to the commissioner of insurance dated October 18, [1715] 1982. What is this correspondence about?

A. Well, because of the nature of our business and particularly the economic conditions we had been going through at this time, we felt that sometimes our line of insurance wasn't being as responsive nor did it give us the opportunity to change our rates, whether up or down as to market conditions. And as president I know I had elected that perhaps it would be advisable if each year, as otherwise, that we would file a rate manual which would keep both information and rates current.

And so this was the second submission following the '81 manual that we were proposing, catching up, proposing, refining the manual.

Q. Now again, had you had any contact with insurance department officials before this rate filing occurred?

A. Yes, again I had spent a considerable amount of time with Mr. Wirtz explaining to him what direction we were going in, trying to determine whether or not we should follow the annual submission policy of placing a rate and a manual on record each year. I believe we probably had three or four discussions again. His comment was that if you are talking about rate increases, you better be prepared to justify them.

Q. How did the bureau justify the 1982 rate filing, [1716] if you recall?

A. Well, I believe this filing, we had incorporated the Arthur D. Little pro forma profitability analyses, which seemed to give some support or credibility to the fact that we wanted to increase certain rates and that the department seemed to rely more on this as a basis for rate review than they did just our submissions and our commentary.

\* \* \* \* \*

[1719] Q. Mr. Grabski, do you know who reviewed this 1982 filing after it was made, who in the insurance department?

A. I believe Mr. Wirtz did and he had stated that the other members of the staff were reviewing it.

\* \* \* \* \*

[1721] Q. Did the bureau expect its rate filings to be carefully reviewed by the department when they were made?

A. I think everyone was under the impression that they were being reviewed very carefully.

\* \* \* \* \*

# TESTIMONY OF NORMAN J. WIRTZ

JUNE 12, 1986

\* \* \* \* \*

[1738] Q. Please state your name, sir?

A. Norman J. Wirtz.

Q. By whom are you employed, Mr. Wirtz?

A. Office of Commissioner of Insurance, State of Wisconsin.

Q. And what is your position there, sir?

A. I am an insurance analyst in the property/casualty section, Bureau of Market Regulation.

Q. How long have you been an insurance analyst, Mr. Wirtz?

A. Sixteen years.

\* \* \* \* \*

[1744] Q. I think you also mentioned that you reviewed premium increases?

A. Yes.

Q. What kind of review does that entail?

[1745] A. Premium increases, we call rate filing. The rate comes to the analyst and he will review the statistical data to see if it supports the increase. If it does not, he will talk to the company's actuary and have more information developed or he will discuss with the supervisor whatever the complications are and what approach we should take to the rate filing.

Q. Do you review rate filings which are made by rate bureaus as well as rate filings that are made by individual companies?

A. That's true.

Q. Are rate bureau filings reviewed any differently from the filings made by individual companies?

A. Generally rate bureau filings are handled with more care and more detail is sought when looking at the numbers in the content of the filing.



Q. Would you say that as a general matter more time is spent in the review of rate bureau filings?

A. Yes.

[1750] Q. Now, do you recall what you did with this 1981 filing when you received it at the insurance department?

A. I discussed it with my supervisor.

Q. Who would that have been?

A. Mr. Keegan.

Q. What did that discussion consist of?

A. I suggested to him that this could be a controversial increase and it would be wise for us to look at it closely.

[1751] Q. Had you made any determination at all as to the extent of the increase that was involved by this rate filing?

A. During the course of review, yes.

Q. And what was your analysis?

A. Approximately 11 percent.

Q. Did you make any statements to Mr. Keegan with respect to whether any additional statistical support for the filing might be forthcoming from the rate bureau, do you recall?

A. I believe the filing had a one-year experience period and it was my opinion that it should have a three-year experience period. And I believe the rate service organization complied and during the course of discussions, did file a three-year experience period.

Q. Do you recall what Mr. Keegan's reaction was to your observations about the significance of the filing?

A. I think he generally agreed with my opinion.

Q. Do you recall my asking you that question at your deposition?

A. No.

Q. And what your response was at that time?

A. No.

Q. I think you told me then Mr. Keegan told you to go through it from head to toe. Does that sound familiar? [1752] A. I very well could have said that.

Q. Well, how did you proceed then with your review of this filing after this conversation with Mr. Keegan?

A. I put on my actuarial hat and, first of all, took all the information that was in the filing and checked its mathematical accuracy. In addition to that, I pulled out the Plotkin studies to use what was relevant in that and checked it against the numbers in the filing.

In addition to that, I pulled out all the annual statements for the title companies and I added together the numbers of those companies involved in the rate filing. And I also checked that against the accuracy of the rates in the rate filing, the accuracy of the data in the rate filing. And then I adjusted the rates at different levels to see how different rate increases would affect residential versus commercial and played with different kinds of rates and so forth.

Q. I think you indicated before that you had requested or thought you were going to request additional financial data or statistical support. Did you do that?

A. To the extent that we requested additional experience years, that I remember doing. The other request I remember is asking them to explain some of the calculations, how they arrived at the revenue increases in the filing. That is the extent of my recall on that. \* \* \*

[1757] Q. Next, Mr. Wirtz, let me call your attention to the next two exhibits which are RX-374 and CX-124, 124-A. This appears to reflect another rate bureau filing which occurred in 1981. Do you have any recollection of that filing?

A. Yes.

Q. Now, was this filing reviewed by someone at the insurance department? Specifically, did you review it?

A. I think I gave a quick review, yes.

Q. I think again, let me see if I may refresh your recollection from your testimony at your deposition. When I asked you on page 50 whether you had reviewed that filing or whether you remembered anything about it, you said, "All I can say with certainty is I reviewed the filing." Is that correct?

A. That is close enough.  
 . . . . .

[1768] Q. Were all rate and form filings that were filed by the Title Insurance Rating Bureau in Wisconsin reviewed by the Department of Insurance in Wisconsin, Mr. Wirtz?

A. All rate and form filings?

Q. That were made by the Title Insurance Rating Bureau in Wisconsin. Were they all reviewed at the department?

A. Could I make several distinctions?

Q. You certainly may.

A. A rating bureau, a rate increase or a major policy form filing would have been reviewed. Endorsements would have been reviewed. The rates [1769] connected with the endorsement would generally, we did not review those.  
 . . . . .

Q. What did you do with respect to rates that were filed in connection with endorsements?

A. We would look at them and apply some kind of a judgment sense as to whether they were too high or too low and that was it. We didn't go beyond that.  
 . . . . .

[1775] Q. I would like to direct your attention now to CX-123-A-D [Letter to Commissioner of Insurance, Wisconsin Department of Insurance from Donald Grabski, Wisconsin Title Insurance Rate Service Organization, dated October 18, 1982] and also CX-124-A through Z-25 [Document entitled "Wisconsin Title Insurance Rate Service Organization Rate Manual," dated December 1, 1982].

Are you familiar with these two documents?

A. Yes.

Q. These reflect the 1982 filing of the rate bureau, is that right?

A. That's true.

Q. Now, I think on direct examination you mentioned that you didn't remember too much about the review of this filing, is that correct?

A. That's correct.

Q. But you didn't do any calculations with respect to this filing, is that correct?

A. No.

Q. Your review consisted of a cursory reading of the filing?  
 . . . . .

[1776] THE WITNESS: That's true.

JUDGE NEEDELMAN: Proceed.

BY MR. ANTALICS:

Q. And then you just stamped the filing accepted under the statute, is that correct?

A. That's correct.

Q. You didn't provide any reports or anything to anybody?

A. No.

Q. No written memoranda of any kind?

A. No.  
 . . . . .

[1798] JUDGE NEEDELMAN: Now, the 1982 filing, you personally did not review or did you? I am not sure what your testimony is with respect to that.

THE WITNESS: I should say I reviewed it, yes.  
 . . . . .

JUDGE NEEDELMAN: Now, describe for me again how intensive was your review of the 1981 filing which you described as being a substantial increase?

THE WITNESS: Well, see, we were concerned that if we didn't have a look at this filing and didn't review it carefully, and the press got ahold of it, the department would have had publicity.

Since the time I had been there, there hadn't been a rate increase in the basic premiums for title [1799] insurance. So we collected all the information we could and looked carefully at the information in the filing as compared to the information in the annual report and what I could break out of Arthur D. Little.

He had some useful things in that his revenue was listed by amount of liability starting from like \$10,000 up to like a half a million. So I could add those categories into the categories in the rate increase filing and see if the revenue projections were fairly accurate in the rate increase filings. And they were.

JUDGE NEEDELMAN: It is your testimony that you gave the 1981 filing an intensive review?

THE WITNESS: Yes.

\* \* \* \*

[1825] JUDGE NEEDELMAN: Now, when the rating bureau asked that for the substantial increase, did you make a comparison of the proposed increase in Wisconsin as compared to rates in other states?

THE WITNESS: What I did, the other states that I checked, I think it was Minnesota and Illinois, I did make a rate comparison, yes.

\* \* \* \*

TESTIMONY OF NEIL AINSWORTH BETHEL  
JUNE 13, 1986

\* \* \* \*

[1885] Q. Good morning. I wonder if you could state your full name and address, business address for the record, please?

A. Neil Ainsworth Bethel. 18300 Von Karman Avenue, Irvine, California.

Q. By whom are you presently employed?

A. The firm is Tillinghast, Nelson & Warren, Inc.

Q. Could you briefly describe for us what your firm does?

A. We are an actuarial and risk management consulting firm and have about 600 employees. And we consult in life and property and casualty insurance and risk management areas.

Q. Can you tell me who the clients of your firm [1886] include?

A. We do work for a variety of clients, state regulators, insurance companies of various types, life insurance and property and casualty insurance companies and corporations who purchase insurance or self-insure some of their risks.

Q. Is the Irvine, California office where you work the only office of Tillinghast?

A. No. Tillinghast has about 20 offices throughout the United States and three or four offices in foreign countries.

Q. In terms of size, can you tell me how Tillinghast compares with other firms that are involved in the same kinds of actuarial and risk management consulting?

A. We are one of the largest actuarial consulting firms. There are some pension consulting firms that are larger, but in the property and casualty area in particular we are the largest consulting firm.

\* \* \* \*

[1893] Q. With respect to your Arizona project, when did that involvement begin?



A. We received a request for proposal to undertake the Arizona examination in about May or June of 1981, I believe.

. . . . .

[1894] Q. Mr. Bethel, I wonder if you would turn your attention, please, to the document on the page that has been marked as RX-96-E. It has a heading marked "Introduction" at the top of the page. And immediately following that heading there is a sentence that reads as [1895] follows: "Tillinghast Nelson & Warren, Inc. (TN&W) has been engaged by the Director of Insurance of the State of Arizona to conduct an examination of the Title Insurance Rating Bureau of Arizona, Inc. (TIRBA), pursuant to ARS Section 20-370."

My question is whether that statement from the report to your recollection accurately reflects the nature of your firm's engagement with respect to this project?

A. Yes, it does.

Q. On that same page, the text goes on referring to six items which are described as being the scope of the examination.

The first two of them read that "The scope of this examination has included an examination of the rate making procedures and methodology"—

MS. MALESTER: Your Honor, I would like to object to the reading of the document into the record. It hasn't been introduced or offered.

JUDGE NEEDELMAN: Objection overruled. This is preliminary.

BY MR. ROACH:

Q. "An examination of the rate making procedures and methodology used by TIRBA with respect to the development of title insurance rates in Arizona," and "A [1896] determination as to whether title insurance rates filed by TIRBA are reasonable, not excessive and not inadequate."

I guess my question, Mr. Bethel, is whether these statements here accurately reflect the scope of the examination that your firm conducted in preparing this report?

A. Yes, it does.

Q. Was the scope of the examination set out in this text determined by the Tillinghast firm or was it determined by the Arizona Insurance Department?

A. No. The scope was determined by the Arizona Insurance Department. This description, these six statements defining the scope, are almost verbatim from the request for proposal that was sent to us initially laying out the scope of the work that the Insurance Department wanted done.

. . . . .

[1904] Q. To whom did you answer in preparing the report, was it the department, was it the Insurance Department or was it TIRBA, the rating bureau?

A. No, it was clear that we were answering to the Insurance Department. They were specifying the scope and they were specifying the completion of the project to their specification.

We were answering to the Insurance Department.

. . . . .

[1910] Q. Now, the Insurance Department to your knowledge had been receiving for several years prior to the time you were involved in the report, in your report, analyses of industry profitability prepared as a result of the Arthur D. Little process, is that correct?

[1911] A. That's right, starting in '78, I believe.

Q. Was it your sense that the Insurance Department was interested in having those reports and the title insurance industry generally looked at closely by someone who had some level of expertise generally in property/casualty areas?

A. Yes, it was.

Q. Was the scope of your assignment, Mr. Bethel, limited to a technical analysis of the title insurance rates as

they existed at that time or were you given a broader job of looking over the title insurance industry generally?

A. I think the general scope of our assignment was relatively broad, to bring to our examination of the rating bureau some understanding or background and the nature of title insurance and how that related to the preparation of rate levels and how that related to the profitability of the business.

So I think it was not intended to be just a technical examination of a particular rate making procedure as such.

\* \* \* \* \*

[1970] JUDGE NEEDELMAN: At the time you conducted your study in 19—well, the study was conducted between what period?

THE WITNESS: The study was conducted starting in about mid 1981 and completed in mid 1982.

JUDGE NEEDELMAN: During that particular time period you weren't looking at a specific rate change, were you?

THE WITNESS: No, we were not.

[1971] JUDGE NEEDELMAN: Now, the TIRBA came into existence when?

THE WITNESS: 1968, I believe. 1968.

JUDGE NEEDELMAN: Between 1968 and the time your study is completed in 1983, actually you did complete the study in 1982, right?

THE WITNESS: Right.

JUDGE NEEDELMAN: Between 1968 and 1982 how many basic rates had been filed?

THE WITNESS: If I can refer to the rate charge that gives the premium per amount of insurance, for example, for an owner's policy, which was kind of the fundamental chart that drives most of the rates, it is my understanding that from 1968 up until the time that our study was completed, that that chart in Arizona had never been changed.

JUDGE NEEDELMAN: Thank you. Counsel.

BY MR. ROACH:

Q. Despite the fact that there had not been rate changes of the sort that you just mentioned during that time period, the Insurance Department had, nonetheless, been provided with information concerning the profitability of the industry in Arizona, is that correct?

A. That's true. The Arthur D. Little reports starting in 1978 gave specific profitability in Arizona [1972] by their way of determining that.

JUDGE NEEDELMAN: I am sorry, did you say '78?

THE WITNESS: Since 1978. Prior to that point in time the insurance companies, and even during that time, would have submitted to the Insurance Department their Form 9's, their annual statements, which contained some material on profitability for each insurance company on a national basis.

And they contained some specific information about their activities in each location, including Arizona.

Now, it is not in the level of detail of the Arthur D. Little material, and of itself, from an actuarial viewpoint, it is not as good as the Arthur D. Little material, but over that entire time frame the Insurance Department was being provided with material that would allow some monitoring of profitability, and particularly during the A.D. Little time period of very, in my opinion, a very precise monitoring of the profitability in that state.

\* \* \* \* \*

[1974] Q. Beginning at page RX-96-I, Mr. Bethel, there is a heading, there is a section of the brief with the heading "Are Arizona Title Insurance Rates, as Filed by TIRBA, Reasonable, Not Excessive and Not Inadequate."

I wonder if you could briefly describe for us [1975] what your conclusion was with respect to this issue?

A. Let me clarify a little bit what Arthur D. Little was reporting and what we were concluding from that.

The first A.D. Little report that was prepared in 1978 did, in fact, have experience being reported and gathered

back to 1972. So the first report submitted covered 1972 up through '78.

Each subsequent report added another year to the data base.

So even though they only reported over a three year period, we were at the end of that period able to look back from 1972 to 1980 and get a perspective for the results as they were realized over that time period.

So the first conclusion we reached was in looking over that time period that the rates as actually used over that time period did not, in our opinion, appear to be excessive based on the rate of return that they generated.

The fact that for the most part the rates being charged over that time period were, in fact, still the current rate also allowed us to be able to interpret that A.D. Little information as some indication of the current adequacy of the rate level because we were still not reviewing a rate filing as such.

[1976] We were looking at it in terms of what the prevailing rate level was and whether, really from our own review, whether we thought that that rate level should change.

And the conclusion there in reviewing the experience up to 1980 was that the 1980 profitability in particular had shown a decline, and we were now sitting somewhere in the middle or late '81 or early '82 when we were reaching this conclusion.

And so even though we didn't have A.D. Little prepared experience for 1981 we knew that, in fact, the real estate recession at that point was still going on.

And so based on how the title insurance experience relates to both those cycles, we anticipated the 1981 would also be adverse in terms of profitability.

So that led us to the conclusion that it might be that the current rates as being charged then were inadequate.

It was really a two-pronged conclusion, a comment upon the rates having been charged over that whole historical period and then a comment about the rates as

currently being charged at the time the study was being conducted.

\* \* \* \* \*

[1980] Q. Mr. Bethel, I think I have only a couple more questions I would like to address to you. The first is whether in light of your dealings with the Arizona Department of Insurance, that we have been discussing throughout the period of the morning, when your firm was retained by the department to conduct this study it was your sense that the department was interested in actively supervising the rate filing activities of TIRBA?

\* \* \* \* \*

[1981] THE WITNESS: Yes, I think they were interested in actively supervising the title insurance and looking at the activities of TIRBA. And I say that from the context that I mentioned before, that we were engaged to do this study kind of hard on the heels of the activity of the Arizona Insurance Department, Commissioner Low in particular, in making a big push in the worker's compensation area to have premium deviations, to examine the issue of profitability in worker's compensation, and that there were parallels seen between worker's compensation and title insurance and the potential at [1982] least for similar actions and, perhaps, similar savings.

And so I think that context helped instigate this examination. And that was the intent on the part of the Insurance Department, in part anyway.

BY MR. ROACH:

Q. Mr. Bethel, is it your sense that, if there had been a different conclusion from your report with respect to the issue of whether the prevailing TIRBA rates were excessive, that some action would have been taken by the Insurance Department with respect to that hypothetical situation?



MS. MALESTER: I object on the basis of speculation.

JUDGE NEEDELMAN: Objection overruled. He may express an opinion.

THE WITNESS: It is my opinion that if the, for example, if the profitability had been quite high in that kinds of insurance business, as measured by A.D. Little or by whatever method, that the department would have instigated some action to lower rates.

I am pretty confident based on their track record in other lines of business, particularly worker's compensation up to that point, that they would, in fact, have done so.

\* \* \* \* \*

**TESTIMONY OF JOHN B. WILKIE**  
**JUNE 16, 1986**

\* \* \* \* \*

[2057] Q. Mr. Wilkie, were you involved in the formation of the Title Insurance Rating Bureau of Arizona?

A. Yes.

Q. Can you tell me what your involvement was?

[2058] A. Originally at the very beginning I attended the meetings, but I was not the official representative. Lawyers Title Insurance Corporation was the member.

I was also on a committee of the Land Title Association, which set up and formed the bureau.

Q. Were you present at the formation meetings of the bureau?

A. Yes. I attended all of those meetings.

Q. Do you recall when those meetings occurred?

A. They were in early 1968.

Q. Mr. Wilkie, did you continue to be involved in the operations of TIRBA, the Title Insurance Rating Bureau of Arizona, in the years subsequent to its formation?

A. Yes. I became the official representative of Lawyers Title Insurance Corporation shortly after its formation and remained on the board until its demise in 1983.

\* \* \* \* \*

[2071] A. In the early years, '64 and '65, there had been or there was one title insurance company in Phoenix, Arizona who was placed in the hands of the receivership of the Insurance Department.

They had been indulging in practices which led to an instability in the industry. And certain legislatures and members of the public and our industry felt that it would lead to difficulties in the entire industry.

[2072] In addition to the title underwriter, who was put in receivership, there was an agency, title agent, who became financially in difficulty and was taken over by its underwriter.

It was these particular matters that led to the introduction in the legislature of this legislation. I believe it

was introduced several times, but it finally passed in 1967.

\* \* \* \* \*

[2073] Do you recall, Mr. Wilkie, when the first filing of rates by the rating bureau was made?

A. The first filing was in early March, I believe, of 1968.

Q. Mr. Wilkie, I would like to show you a document that has been admitted into evidence in this proceeding as Exhibit CX-8 and ask you to briefly take a look at it.

[2074] Are you familiar with this document, Mr. Wilkie?

A. Yes.

Q. Can you tell me what it is?

A. This is a copy of the filing made by the rating bureau with the director of insurance on March 15, dated March 15, 1968, which is a filing of the title insurance rates approved by the rating bureau.

Q. Can you describe for me how the rating bureau came to determine to file the rates in the form in which they are shown in CX-8?

A. After the rating bureau was officially formed we met in a continuing session for approximately two weeks. Each person attending the meeting, and there was a representative, to the best of my recollection, for each one of the title underwriters, and there were also persons attending from the title insurance agents, they brought with them various copies of the rates that they were using at that time.

One of them brought a proposed manual which had come out of, primarily out of California with the definitions and the classifications of the rates.

We discussed them over a period, as I say, of approximately two weeks drafting this document for the purposes of filing.

The basic rate, which you will find on the first, [2075] well, I think it would be the third and fourth pages, was a rate which was taken from a rate schedule that we had

at that time, "we" being Lawyers Title of Arizona, it was then called Arizona Land Title and Trust Company, with some very minor adjustments, and we eliminated the \$500 rate since nobody issues \$500 policies any more and we went from \$1,900 up.

And this was adopted by the rating bureau as the basic insurance rate.

Q. Are you referring to the rate schedule that is shown on pages CX-8-C and CX-8-D of the document in front of you?

A. Yes.

Q. So these rates were rates that had been used in the marketplace prior to the time that the rating bureau was formed?

A. Yes.

Q. Were these rates typical of the rates that were charged by title insurers in that time frame?

A. Yes. The rates were not all the same, but they were basically in the same ballpark. There were variations, but they were not material variations. And for the purposes of the filing we agreed and adopted this particular schedule.

\* \* \* \* \*

[2076] Q. Mr. Wilkie, do you recall whether there were discussions concerning possible general rate changes in the TIRBA rates during the time period when TIRBA was in existence, that is, discussions among TIRBA members?

A. From time to time there would be discussions of the possibility of rate changes. Some of our members, particularly some of the smaller ones, felt that we should have rate increases. They were discussed.

We felt that we did not want to go in with any major changes until we had developed a foundation of financial and statistical information.

What we had developed indicated that the industry was basically sound. We felt that it would be [2077] unwise to go in with any major adjustments.

Q. Were efforts made by TIRBA to build a system to collect data to support the appropriateness of the TIRBA rates?

A. Yes. I became president of the rating bureau. I believe I was the second one. That would have been probably the latter part of 1969, early 1970. We began to look into what was available in this area.

I talked with representatives of existing rating bureaus. We looked at some of the forms and procedures that were being used in the State of Texas where they have the state-regulated rates.

And we actually interviewed the person from the State of Texas, a person by the name of Sammy, S-a-m-m-y, Sapp, S-a-p-p, who was an employee of the Texas Insurance Department.

He came to Arizona and attended our convention in probably the latter part of '69, I am not quite clear on that date, and gave us a proposal which we accepted. And unfortunately he had died about two months after his visit to Arizona, so we were frustrated in that area.

We talked to a person by the name of Jeffrey, J-e-f-f-r-e-y, I believe, Livingston, who was a doctoral student at ASU and had done work in modeling rate making for the insurance and I believe other industries and [2078] prepared for us a model, computer model, which none of us ever really understood. Nothing more came of that.

We talked to several accountants and finally hired the firm of Ernst & Ernst to do rate, not rate, income and expense and profit gathering for us.

A committee was appointed by the rating bureau, and it consisted of mostly the financial people in the home offices of the underwriters, to develop a format for the collection of financial statistics.

We put together, based on this information, a series of statistics, financial statistics from the year 1966 to the year 1970, including the year 1970. This information

was turned over to Ernst & Ernst when they started their gathering in the year 1971.

Each underwriter and each agent turned over to Ernst & Ernst on forms prepared by the bureau their income, expense and profit statements. Ernst & Ernst took this data, including the previously-accumulated data, and prepared a statement or experience exhibit each year until 1977, I believe.

Q. Mr. Wilkie, do you recall whether you made any contacts with representatives of title insurance rating bureaus in states other than Arizona about the ways in which TIRBA might go about its data collection?

A. Yes, we talked to several of them. I remember [2079] the State of Pennsylvania. I believe there were others. However, I cannot remember who they were.

We did some work from the work that was being done in the State of California at the time.

Q. With respect to the Ernst & Ernst reports that you mentioned, I have a couple of questions.

Did Ernst & Ernst determine what data was to be collected for use in the reports that they were preparing?

A. No. That determination was made by the bureau. Ernst & Ernst's primary function was to take the information from each individual member so that each company wouldn't know what the other company was doing.

There was a certain resonance to exchange direct information, so that it was given to Ernst & Ernst who put it all together on an industry basis, so that the information would be on the industry rather than each individual member.

Q. Did Ernst & Ernst prepare such a report every year?

A. Yes.

Q. Were the Ernst & Ernst reports submitted every year to the Insurance Department?

A. No.



Q. What was done by TIRBA with the data that was received from Ernst, with the reports that it received [2080] from Ernst, excuse me?

A. We maintained them. We reviewed them when we received them. They contained a statement each year, an accumulative statement as to the net profit of the industry over that period of time.

We felt that we should have them available in the event that they were required by the department or, in the event that we deemed that we wanted to go in and have a rate hearing, we felt that we should have that information.

They were subsequently transmitted to the department, I believe, in early 1977.

The prior data, which was done by the bureau itself for the first five years, was submitted to the department in 1971.

Q. Can you tell me the circumstances that prompted the submission of that data to the department in 1971?

A. The department had issued a call for a hearing involving, as I recollect, two matters. One was the method of determining rates, and the other had to do with the determination of risk premium and retaliatory tax provisions of the state code.

[2081] Do you recognize this document, Mr. Wilkie?

A. Yes. This is a letter from James C. Wickline, W-i-c-k-l-i-n-e, president, and that is president of the Title Insurance Rating Bureau of Arizona, dated November 1, 1971 addressed to Millard Humphrey, director of [2082] insurance, State of Arizona.

Q. I would like to direct your attention to the letter's reference to several enclosures, and particularly in the third heading reference is made to the submission of the enclosure of "a consolidated statement of title insurance industry statistics covering the period from 1966 through and including 1970."

Do you know what this reference refers to, Mr. Wilkie?

A. That refers to what I have previously mentioned, the collection of data by our own rating bureau. It was an income and expense statement consolidated from the figures of most of the industry, I would not say it was all of the industry, however; a good portion of the industry.

[2083] JUDGE NEEDELMAN: What was this controversy over risk premium all about?

THE WITNESS: Basically it went to how much money the State of Arizona was collecting in taxes. And each company basically had a different method of filing the tax form.

And it is some time ago, my memory is a little hazy, but I believe one of the major companies showed a very small amount of tax where one of the minor companies paid a considerable amount of tax and, in fact, after the hearing they filed a petition for a refund on their tax and actually, I believe, it got it, but it had to do mostly with tax matters, tax income.

[2092] Q. Do you recall having any meetings with representatives of the Insurance Department with respect to the escrow rate filing?

A. Yes. I met with some others, with Emil Barberich of the Department of Insurance. I believe it would have been possibly September of 1977.

Q. Do you recall what the nature of your discussions were at that meeting?

A. We were in the process of, the rating bureau was gearing up for the filing up of the escrow rates and we wanted to discuss with the department what their requirements would be in this connection.

Q. What do you recall Mr. Barberich saying about the nature of the requirements of the Insurance Department, if anything?

A. Well, that we would have to be in a position to [2093] substantiate our rate filing. He was accompanied by an actuary who was a consultant to the department by the name of Curry, C-u-r-r-y-, a retired actuary from one of the insurance companies who was a consultant to the department.

There were also in attendance other members of the rating bureau, Owen Waggoner, W-a-g-g-o-n-e-r, and others. And we asked them, in essence, what would they require when we came in with our filing for the escrow rates? And they told us we would have to be in a position to substantiate that filing.

Due to the time constraint, which I believe, I can't remember, it was relatively short, they indicated that if we filed without substantiation it would be accepted provided that within, I believe, a one year period we came in with proper statistics backing up those filings.

Q. Do you recall whether you had any discussions with Mr. Barberich about the possibility of the rating bureau filing a rate which was higher than that which was currently prevailing in the marketplace?

A. There was some discussion of that. And a question then would be the balancing of the escrow portion of the rate as against the title insurance rate. If one went up, perhaps the other would have to go down [2094] and vice versa. It was a rather general discussion.

Q. Were you acquainted with Mr. Curry, who you mentioned was a consulting actuary who was present at the meeting?

A. No. That was the first time I had met him.

Q. Was there any discussion concerning efforts by TIRBA to begin to develop information with respect to the experience of the industry under the escrow rates that were to be filed?

A. We had indicated to him that we had been gathering statistics through the Ernst & Ernst plan and, also, that we had been discussing with Dr. Plotkin,

P-l-o-t-k-i-n, of Arthur D. Little Company methodology in this area.

Q. What had been your discussions, by "your" I mean TIRBA's discussions, with Dr. Plotkin of the A.D. Little firm?

A. Well, I have trouble here with time frames, but it was my recollection that we had had general discussions with him. Some of our people, particularly those from the national offices, had had direct involvement with Dr. Plotkin in other states.

And he had developed for other states, I believe they were already in existence at that time, financial and statistical plans.

[2095] Q. And were your discussions with Mr. Plotkin relative to the initiation of a similar plan in Arizona?

A. Yes.

Q. Can you describe for me briefly how TIRBA went about determining the rates that it would file as its escrow rate filing in 1977?

A. Yes. That procedure was basically the same as that followed in 1968 in the original filings. I believe each member of the bureau was represented and brought with them copies of the various schedules and manuals which they were using.

We sat down and compared them all. There were variations. Some were a little higher in one area and lower in another area. And we picked out from those, and I can't remember which one it was, a schedule of basic escrow rates.

We also had at that time the, I believe it would have been the six year information which we had gathered and given to Ernst & Ernst to have incorporated in their figures. I believe together we had 11 years of information showing the overall profit and loss picture of the industry.

At that point in time it showed approximately, I believe, 15 to 16 percent net return. And we felt that we should stick to the historical data and, therefore, we



[2096] filed rates that were basically no change from that generally being charged by the industry at that time.

Q. Did the Insurance Department approve the escrow rate filing?

A. They accepted it on a condition which we understood to be the, and within one year we had to bring in—well, at the time of the filing, the filing indicated that we had employed A.D. Little and, in fact, I believe a letter was attached, the letter of employment or something of that nature.

JUDGE NEEDELMAN: A letter from whom?

THE WITNESS: From the bureau to Dr. Plotkin, A.D. Little, employing him for that purpose. That was attached to the rate filing. And the condition was that within the one year from that date we would come in with statistics, figures, supporting the filing.

\* \* \*

[2099] Q. Mr. Wilkie, do you recall the Insurance Department announcing a statutory examination of TIRBA in approximately 1980?

A. Yes. The bureau received a letter from the director during the year 1980 so indicating his intention.

Q. I would like to direct your attention, if you please, to a document that has been admitted into evidence as RX-93 and ask you if this is the letter to which you just referred?

A. Yes.

\* \* \*

[2101] Q. Mr. Wilkie, I would like you to switch gears again for a moment and ask you whether you are familiar with a litigation known as United States versus Title Insurance Rating Bureau of Arizona.

A. Yes.

Q. How did you become familiar with that litigation?

A. Well, at the time of that filing I was a member of the board of directors of the rating bureau and was a member of a committee that was appointed to attempt

to control the actions of the attorneys that were in that litigation.

Q. Mr. Wilkie, is it your understanding that that complaint in that case was brought by the United States Department of Justice on behalf of the United States?

A. Yes.

Q. Can you tell me briefly the nature of the allegations made in that complaint to the best of your knowledge?

[2102] A. The allegation was that the establishment of rates, escrow, of the escrow portion of the rate filing, constituted a violation of the antitrust laws.

Q. To your knowledge did the allegations made by the Justice Department on behalf of the United States involve any challenge to the filing by TIRBA of any non-escrow rates as it had been doing since 1968?

A. No, it did not.

\* \* \*

[2112] Q. Now, the hearing that was held and that resulted in RX-76 had no effect on the rates that were being charged during that time by the members of the Title Insurance Rating Bureau, is that correct?

A. That's correct.

Q. And during this hearing there was no review by the Insurance Department of the actual rates, all-inclusive rates that were being charged by title insurers, is that correct?

A. Other than the receipt of my testimony in connection with the method of the original filing.

Q. And that testimony referred to how you had gotten together and arrived at the rates, is that correct?

A. Yes.

Q. The second document that I placed in front of you we have also looked at before. It is CX-8-A through Z-12. [Letter from V. L. Siepel, Secretary-Treasurer of Title Insurance Rating Bureau of Arizona to Insurance Department of Arizona, dated March 15, 1968 with attachment.]



And I believe you testified this was the first rate manual that was filed on behalf of the rating bureau in 1968, is that correct?

A. Yes.

Q. And, again, let me make sure that I understand correctly. Prior to the filing of this rate manual there had never been any rates filed with the Insurance [2113] Department either by the rating bureau or by individual title insurance companies, is that correct?

A. That is correct.

Q. Now, these rates were arrived at at a meeting or a series of meetings where all of the companies issuing title insurance policies, title insurance companies in Arizona, brought their own rates and a consensus was arrived at, these joint rates that were then filed, is that correct?

A. That's correct.

Q. Other than the filing itself which we have identified as CX-8A through Z-12, the rating bureau did not provide the Insurance Department with any other data between the time the filing was made and the time the rates became effective, is that correct?

A. Not to my knowledge.

Q. And to the best of your knowledge the Insurance Department did not request any additional data, is that correct?

A. That's correct.

Q. And to the best of your knowledge there were no communications, meetings, telephone calls or anything of that sort between the Insurance Department and the rating bureau between the time the filing was made and the time the rates went into effect, is that correct? [2114]

A. I have no recollection of any such calls.

Q. You are not aware of the Insurance Department making public the fact that the rating bureau had made its first filing, is that correct, prior to the time the rates went into effect?

A. That's correct?

Q. The Insurance Department did not hold a hearing in connection with this filing, is that correct?

A. Not to my knowledge.

Q. And no one at the Insurance Department ever notified you that they had made a determination that they had sat down and made a determination that these rates met the statutory criteria, did they?

A. No one spoke to me personally.

Q. You are not aware of anyone in the Insurance Department preparing any type of analysis or review of this filing, are you?

A. No, I am not.

\* \* \* \* \*

[2132] JUDGE NEEDELMAN: Now, do I understand your testimony that the justification for the basic schedule and the escrow schedule appeared in stages, and correct [2133] me if I am wrong about this, first there was an Ernst & Ernst report in 1977, is that correct?

THE WITNESS: First there was the one that we put together ourselves.

JUDGE NEEDELMAN: What was that one?

THE WITNESS: That would have been '70, encompassing the years '66 through '70.

JUDGE NEEDELMAN: And then we get, what is next?

THE WITNESS: Then Ernst & Ernst.

JUDGE NEEDELMAN: In 1977?

THE WITNESS: Through '77, yes.

JUDGE NEEDELMAN: In other words, Ernst & Ernst is historical from 1970 through '77?

THE WITNESS: They also took the material we had given them and incorporated it into their report, so it went '66 to '77.

JUDGE NEEDELMAN: And then Plotkin?

THE WITNESS: Then Plotkin.

JUDGE NEEDELMAN: And Plotkin covered what period?

THE WITNESS: Well, they picked up in '78. I am uncertain at this point whether they went through '81. I know they went through '80. I think we, perhaps, had stopped.

See, the actual data isn't put together until [2134] the following year. So you are always six months behind.

JUDGE NEEDELMAN: Did Plotkin file more than one report?

THE WITNESS: My recollection is that he did.

JUDGE NEEDELMAN: A yearly report?

THE WITNESS: Yes.

JUDGE NEEDELMAN: And then the fourth piece of justification, I don't know whether you put it in that category or not, is the Tillinghast report for the state?

THE WITNESS: Yes.

\* \* \* \*

**TESTIMONY OF DELORIS WILLIAMSON**  
**JUNE 16, 1986**

\* \* \* \*

[2169] Q. Ms. Williamson, how long have you been employed at the Department of Insurance?

A. Since September 1981.

Q. And what is your present position there?

A. I am supervisor of the property and casualty section.

\* \* \* \*

[2175] Q. Ms. Williamson, I would like to ask you some questions about the organization generally of the insurance department. Now, in addition to your section that deals with property/casualty matters, are there other parts of the insurance department that are involved in the regulation of title insurers?

A. Almost every section or division within the Department of Insurance is in some way involved in the regulation of title insurers.

Q. Can you give us the names of some of those sections that are involved in title insurance regulation?

A. The corporate affairs and financial division gets involved in the actual finance and examination process. The hearing division gets involved with some of the administrative hearings that would take place. My section, the property and casualty section, would get involved, of course, with the rules and rates and forms. And the licensing section would get involved in the licensing of title agents.

Consumer affairs and investigations division would tally up complaints received against any insurer, whether title insurance was involved, and also would get involved in responding directly to consumer complaints or any kind of a telephone or written complaint regarding any insurer in the State of Arizona. And, of course—

\* \* \* \*

[2190] Q. Ms. Williamson, are all lines of insurance supervised by your office subject to the same general

statutory procedures with respect to the filing and the effectiveness of the rates?

A. Yes.

Q. Are all filings that are received in your office examined and reviewed by you to determine whether they conform to the statutory criteria?

A. Not personally by me but by either myself or someone within my section, yes.

Q. Does each filing that you receive get the same level of scrutiny by your section?

A. For the most part, yes, except I would think that sometimes we devote more time to title.

Q. Is it the practice of your office to request a clarification and additional information concerning a rate filing if you have questions about it when it is received?

A. Very much so. If there is something that just does not for one reason or another, whatever reason it may be, seem logical to us, does not seem copacetic, we will challenge that rate filing. It may be the entire rate filing. It may be a portion thereof.

\* \* \* \*

# TESTIMONY OF EMIL L. BARBARICH

JUNE 17, 1986

\* \* \* \*

[2223] A. I was employed by the Department of Insurance as their chief deputy director.

Q. And how long did you hold that position?

A. I held that job from April 1973 to July 1982.

\* \* \* \*

[2226] A. Well, as chief deputy director, the statute calls for a chief deputy director to replace the director in the event there is something that creates a situation where the director cannot do his job plus the fact that the title also calls for that job to be the supervisor of property and casualty rates. That is the official title of that particular job.

\* \* \* \*

[2227] Q. Can you describe for me briefly the nature of the review that you would make of property/casualty rate filings that were received by your office?

A. All rates, at the time when I started with the department, all rates were under a prior approval basis, which meant that every rate change that went through had to be reviewed, scrutinized and checked out carefully to be sure that it met certain criteria as the statute indicated. And if those were the situations, if it [2228] worked out, we would then approve the rate.

Q. Did the prior approval system to your recollection have any provision that made the rates effective after a period of time in the event the insurance department did nothing to approve or disapprove the rates?

A. Well, if a rate change came in and sometimes with the workload that came in, sometimes those rates came in by the dozens. And the statute said that there would be a deemer period, I think it was two months, I am not sure. If the time passed where the deemer period took effect, then the rate change was effective at that time.



Q. While you were at the department, was it your practice to generally permit rate filings to go into effect pursuant to that deemer provision without any review by the department?

A. Well, actually the companies that made the rate filings would prefer not to deem a rate or let it go into the deemer period because the statute also permitted the property and casualty people to look at the rate again. And if it was inappropriate, they could disapprove it.

Consequently, the companies who made the filing would wait until we actually approved it rather than vote the deemer period.

[2229] Q. So it was not your practice to let rate filings go by without being reviewed by your office, is that correct?

A. Very seldom, very seldom did the companies use the deemer statute.

JUDGE NEEDELMAN: What is a deemer statute? I don't want to let the record have that phrase floating around in it.

BY MR. ROACH:

Q. Can you explain what you mean by the "deemer provision"?

A. Your Honor, the deemer statute is the situation where if the department sits on a rate filing a long, long time, the company that makes the filing has the right to invoke that so-called rate increase because they didn't act in time. But it was mostly—the statute also said that once the department looked at the rate, they could revoke that rate increase and have a hearing or whatever they needed. So that it was a situation where the companies would prefer to have an approval rather than deem the rate.

JUDGE NEEDELMAN: Have it approved?

THE WITNESS: Well, if they would deem it, then it would be sort of a question of whether they could actually

use that rate forever or for whatever time they [2230] wanted.

JUDGE NEEDELMAN: I assume the phrase, correct me if I am wrong, means that under the statute if a rate is not approved within a certain period, it is deemed approved?

THE WITNESS: Right.

JUDGE NEEDELMAN: Is that correct?

THE WITNESS: Right.

BY MR. ROACH:

Q. Was this prior approval system that you have just described in effect for title insurance during the period when you were at the department as chief deputy?

A. Yes, it was.

Q. Under the system, can you explain how your office went about reviewing a rate filing when it was received?

A. Every rate filing, and I have to presume just for the rates, every rate filing had a review period. It was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would be sometimes situations where more information was needed and once that was obtained and it met the requirements, it would be approved.

Q. Would every filing receive the same degree of scrutiny?

[2231] A. The same degree of scrutiny was used on every rate filing that came in.

Q. Was it the practice of your office to review statistical and financial data in support of rate filings where you thought it was necessary?

A. Always. In other words, if it had to be supported actuarially.

Q. Did you ask for actuarial support for each and every rate filing that you received?

A. No, it was not necessary to do that because there was such a variety of rate filings that actuarial support

wasn't necessary in every case. The only time we would get into any actuarial support—and I have to use the whole property and casualty situation now—if a general rate increase went through on an automobile where so many people would be affected and a company had a lot of policyholders, we would seek actuarial support and the use of an actuary when necessary.

Q. So that part of your review process was to make a determination about whether actuarial data would be necessary to justify the rate filing?

A. That's right, but not in every instance.

Q. Did you have actuaries on the staff of the department to help you in doing it in the instances where you thought that actuarial review was appropriate?

[2232] A. No, we did not.

Q. How did you go about getting the actuarial help you needed?

A. Fortunately since Arizona is the sunbelt state, there were three or four actuaries who had retired in Arizona and we made use of their services and they were glad to do whatever services we would need. We really used one of those actuaries on a case-by-case basis.

Q. And these actuaries would be hired—would bill the department for their services, I take it?

A. Yes.

Q. Did you receive rate filings that were made by rating bureaus as well as filings by individual insurance companies?

A. Yes.

Q. Would rating bureau filings receive any different kind or level of scrutiny than that which was made for individual company filings?

A. Every rate filing that came in got the same treatment by scrutiny and check, whether it would be a company or whether it would be a rating bureau.

Q. So in connection with rating bureau filings, if you thought it was appropriate, you would ask to re-

view statistical and financial data in support of those filings?

[2233] A. Yes, we would.

Q. Would there be occasions when you would contact the rating bureau that had made the filing to obtain more information, if you had questions about the filing?

A. That happened quite frequently when they submitted a rate filing, we always asked—if necessary, we would request more data.

Q. Mr. Barberich, I would like to focus now on title insurance rate filings during that time period. Did title insurance rate filings to the best of your recollection constitute a substantial percentage of the rate filings that were reviewed by your office?

A. Very little, very small percentage.

Q. Can you estimate roughly the percentage of the office's activities that were devoted to title insurance filings?

A. As a basis, it was something like 5 or 600 companies that made filings in the State of Arizona and, as I recall, there were no more than 11 or 12 title companies. So that actually constituted a very small portion, possibly 2 or 3 percent of the filings that we would have received compared to the others.

Q. We have discussed generally the practices that you used in reviewing property and casualty rate filings. Were the same sorts of practices that you have just [2234] described used in connection with filings that were received in the title insurance area?

A. Yes and possibly more so because there seemed to be a bone of contention with the buying public about title insurance. Consequently, we had to delve into it a little more and use more than our proportionate share of time to get some of the answers for the people that bought title policies.

Q. Did you have more questions about filings that were made in the title insurance area than in some other lines?

A. On a proportionate basis, yes.

Q. And when you had those kind of questions or wanted to get some further information, was it your practice to ask questions of the title insurer who is making the filing?

A. Every time.

JUDGE NEEDELMAN: Title insurance was a responsibility of yours?

THE WITNESS: Yes. In the statutes, title insurance was classed as casualty.

\* \* \*

[2244] Q. Mr. Barberich, I would like to direct your attention to a document marked RX-89. This document is entitled, Profitability Analysis of the Arizona Title Insurance Industry, 1972 to 1977. And it is dated September 1978. It bears the name of the Arthur D. Little firm in the lower right-hand corner of each page.

[2245] Do you recall whether, Mr. Barberich, this is the follow-up that was mentioned in the letter that we were just looking at that you wrote to TIRBA?

A. I would presume this is the result of the discussions we had.

Q. Do you have any specific recollection about the circumstances of the filing of this report?

A. Not exactly, no.

Q. Do you recall, Mr. Barberich, do you recall receiving this report?

A. Yes.

Q. Do you remember whether you reviewed the report when you received it?

A. It was reviewed.

Q. Did you draw any conclusions about the prior rate filing or about any matters after reviewing the report?

A. My conclusions were that it was a good report, yes. And it sort of designated the area of what the title

insurance rates, the title insurance profitability was about, yes.

Q. Did the report cause you to have any doubts concerning the validity of or appropriateness of the rate filing that had been made by TIRBA in 1977, the one that we just looked at as RX-63?

[2246] A. I didn't think at that time that it would have any bearing on this because it would really, these reports merely discuss the overall profitability. But I felt that it did not have any bearing on individual approval of a particular rate filing.

Q. Did you have any concern after reading the report that the title insurance industry in Arizona might be earning excessive profits under the rates that were then on file?

A. I did not think so.

Q. Mr. Barberich, if the report had shown that title insurers were earning profits at levels higher than you thought were appropriate, would it have been the policy of the department to have taken some response?

A. Yes, it would.

Q. Do you recall, Mr. Barberich, whether in years subsequent to September 1978, there were submitted to your department any further reports prepared by the Arthur D. Little firm?

A. Yes, there were.

Q. Do you recall how many reports were submitted?

A. I believe there were three.

Q. Were these various Arthur D. Little reports, to the best of your recollection, reviewed by the director of the department?

[2247] A. Yes.

\* \* \*

[2250] Q. Mr. Barberich, I think you mentioned that you [2251] had had some interest in getting an outside third party to look over the title insurance situation in the A.D. Little reports, is that correct?

A. That's right.



Q. Can you tell me who you contacted or the department contacted, rather, in connection with that outside review?

A. Over a period we tried to find someone that could give us an unbiased look at the whole thing. There was a gentleman that was with the Insurance Department of Utah that felt that he had it and he subsequently became a professor at the University of Washington. We used him. But we thought he gave us a report which we thought didn't fit the atonement we were looking for, merely to the degree that he was terribly biased against the title people. We thought that was unfair.

Consequently, we looked to Peat Marwick and Mitchell, who agreed to take it aboard but subsequently decided not to go along.

And, finally, I knew Bill Leslie from the Tillinghast, Nelson & Warren organization who had a lot of experience in the actuarial field and I discussed this with him over the telephone and he thought he would like to try it and do an examination, give us a report.

\* \* \*

[2253] Q. How was it that you came to choose the Tillinghast firm to do the study?

A. Well, it was really Bill Leslie that we were looking to and he happened to be with that firm. His credentials were very great. He was a senior vice president with the Continental Insurance Group. He had been president of the National Council on Compensation Insurance. He was a past president of the Fellow of the Casualty Underwriters Society, also president of the American Academy of Actuaries and he had a varied experience. And so we thought he would be the person to do this.

\* \* \*

[2261] Q. Without getting into each and every title insurance related matter that came up during the course of your work as chief deputy director, was it the policy

of the insurance department to actively regulate the [2262] title insurance business during the time when you were employed there as chief deputy director?

A. Yes, it was.

Q. Was it the policy of the department to actively regulate the rates and rate filings that were made by the Title Insurance Rating Bureau of Arizona?

A. Yes, it was.

Q. During the time when you were chief deputy director, would the Arizona Insurance Department have acted promptly to correct the situation if there had been any indication that title insurance companies in Arizona were earning excessive profits?

A. Yes.

\* \* \*

[2266] Q. Now, could you turn to the next document which is RX-63 [Letter from Owen Wagoner, President Title Insurance Rating Bureau of Arizona to Arizona Department of Insurance, dated November 9, 1977, with attachments], which I believe you also discussed briefly in your direct testimony.

Now, in 1977 at the request of the Arizona title insurance companies, the legislature passed a state statute concerning escrow rates, is that correct, sir?

A. That's right.

Q. And the insurance department did not take any stand either in favor or opposed to that, is that correct?

A. Yes.

Q. So it was not passed at the request of the insurance department?

A. That's right.

Q. Now, after the statute was passed, the Title Insurance Rating Bureau made this joint rate filing we have identified as RX-63, is that correct?

A. Right.

Q. As far as you can recall, sir, you did not receive any additional information from the rating bureau in

connection with this rate filing prior to the time these rates went into effect, is that right?

A. That's right.

[2267] Q. And based on the notation, I believe, that you discussed with Mr. Roach on the third page identified as RX-63-B, which says, "subject to follow-up," did you write that notation because you had no way to know whether these rates, in fact, could meet the statutory criteria?

A. That's right.

Q. Do you recall anyone else in the insurance department being involved in reviewing this rate filing prior to the time the rates went into effect?

A. No, I don't.

Q. Did anyone at the insurance department prepare any type of evaluation or analysis of this filing at the time the filing was received?

A. Not to my knowledge.

Q. The next document you have in front of you is identified as RX-77 and it is a compilation of Title Insurance Rating Bureau of Arizona agent composite experience, underwriting companies composite experience and underwriting companies and agents' consolidated experience.

And this document, as can be seen on RX-77-B, was prepared by the company of Ernst & Ernst. Now, am I correct that you do not have any recollection of ever receiving any data put together by the Ernst & Ernst [2268] company for the Title Insurance Rating Bureau of Arizona?

A. That's correct.

Q. And you never reviewed then any data prepared by Ernst & Ernst, is that right?

A. Right.

Q. And you never used any data prepared by this company in your review of title insurance rates or any title insurance filings, is that correct?

A. Yes.

Q. Now, you discussed in your direct testimony several reports that were prepared by Arthur D. Little and submitted through the rating bureau to the insurance department.

Now, in connection with these reports, am I correct that you could recall approximately two telephone conversations that you had with Dr. Plotkin who had prepared these reports?

A. I think so, yes.

Q. And these were conversations initiated by Dr. Plotkin asking you for some information the insurance department had, is that right?

A. Probably.

Q. Now, you did not review the plans, the financial data gathering plan or the statistical data gathering plan which Dr. Plotkin put together, is that correct? [2269] Not the data, the plans.

A. No, I did not review the plans.

Q. And you never approved these plans as a result, is that correct?

A. That's right.

Q. Now, you mentioned in your direct testimony that you did receive data collected pursuant to these plans at the insurance department, is that correct?

A. That's correct.

Q. And do you recall that you told me at your deposition that you did not review these Plotkin data reports in any great detail, is that correct, sir?

A. Yes. Well, when I said I did not review it, I was aware and I looked them over but I didn't make an intense study of it.

Q. In fact, you felt these reports were considered more important by the title insurance companies than they were by the insurance department, isn't that correct, sir?

A. Well yes, only to the degree that as a rate regulator, I don't think it had that much impact on it.

Q. You did not have any discussions with Dr. Plotkin or anyone else at A.D. Little about these reports or the data?

A. No.

\* \* \* \* \*

[2283] JUDGE NEEDELMAN: In your mind was the Arthur D. Little report an adequate justification for the TIRBA rate?

THE WITNESS: No.

JUDGE NEEDELMAN: Why not?

THE WITNESS: Because the Arthur D. Little report did not support some of the answers we needed for the TIRBA rate. We need some actuarial support.

JUDGE NEEDELMAN: Be more specific. What did the Arthur D. Little report not tell you that you thought you needed to know?

THE WITNESS: Well, the Arthur D. Little report at the bottom line indicated what the profitability factor was but in my opinion it wasn't enough to support those rates because I would have to presume that it didn't lead into the support of whatever charges they had. The Arthur D. Little report gave an overview of the whole title business but it didn't, in my opinion, did not support those rates.

JUDGE NEEDELMAN: Well, again, I am going to press you on this point and I don't know if you can [2284] recall the Arthur D. Little material that clearly but I would like to know in what specific respects you felt that the Arthur D. Little report was not an adequate justification for rates?

THE WITNESS: Well, if you looked at the Arthur D. Little report, the TIRBA rates were broken down into various segments. I can't recall but it is broken down into very small segments, a rate for this and a rate for that.

There was no way, by looking at the Arthur D. Little report, that I could tell whether there was an adequacy or inadequacy in that. It was not detailed enough to

support that particular segment of the rate filing or whatever they had.

JUDGE NEEDELMAN: What about the expense data in the Arthur D. Little report? Did you consider that to be adequate?

THE WITNESS: Yes, the expense data was varied but that doesn't make up the whole rate. They have the administrative cost, the reserves and there were many other features that the rates depicted but you couldn't extract that from the Arthur D. Little report.

\* \* \* \* \*

[2289] THE WITNESS: My records show, I have a filing here that dates 1968.

JUDGE NEEDELMAN: All right. Now, I gather from your testimony, and I don't want to mischaracterize your testimony, that with the exception of the search for someone to do the critical review and the appointment of Tillinghast, the department did not do anything with respect to that basic rate between 1973 and 1982?

THE WITNESS: You are right, sir, Your Honor, except that we tried. We made a real hard effort to find someone.

JUDGE NEEDELMAN: Now, what did the department do to the best of your knowledge at the time the rate was actually filed, which goes back to 1968?

THE WITNESS: I really don't know. I would have to presume that it was the rate that was accepted and it stayed there.

JUDGE NEEDELMAN: The rate was filed in '68 but do you know when the justification for the rate was filed?

THE WITNESS: Like eight years later. You mean when did the justification for the filing—well, many years later.

JUDGE NEEDELMAN: It wasn't done until the Arthur D. Little material was filed?

THE WITNESS: That's right, sir.

\* \* \* \* \*



**TESTIMONY OF THOMAS M. FERRARO**  
**JUNE 17, 1986**

\* \* \* \* \*

[2300] Q. What was your connection to CBTU?

A. I was Chicago Title's representative to the board.

Q. Beginning at what date approximately?

A. Somewhere in 1972.

Q. And how long did your representation to the CBTU board continue?

A. Up until January of '85 when the company withdrew from the board.

\* \* \* \* \*

[2311] Q. Subsequent to the time that you were dealing with personnel from the Connecticut Insurance Department [2312] on the variable rate mortgage, did you or any one of your colleagues have occasion to meet with members of the Connecticut Insurance Department on other regulatory matters before that department?

A. Yes. I basically met with, I guess it was, with Mr. Bell and Mr. Disanto about a couple months later, I believe it was in the fall of '81, and with Robert Anderson, who was then our counsel, our local counsel in Connecticut.

Q. Where was this meeting held?

A. Hartford, Connecticut.

Q. Where in Hartford?

A. In a restaurant.

Q. What was the meeting all about?

A. Well, by this time the board had made the determination to file for a rate increase so, having a bad experience on being rejected, we decide that we should chat with the commissioner to make sure that if we go through with a rate increase, we would have the proper format, filings because it was the first one we have ever gone through. We wanted to make sure we were going to do it right. So that generally was an informative meeting.

Q. Had you already decided to file or had you filed yet or you were thinking of still filing?

A. We were on the brink of filing.

[2313] Q. How long did this meeting last?

A. A luncheon meeting, I would say a couple hours, 12:00 to 2:00, something like that.

Q. What sort of information or insights, if any, did you get from the representatives of the Connecticut Insurance Department at that meeting?

A. Well, they pretty much reiterated what we had to do, who to file, how to file, make sure that we had backup justifications. And they concluded by saying, you know, you are going to have a problem. It is not a rubber-stamp situation. We are really going to look at it because we think the rates are pretty high as they are. So we went back and that is when we decided to use the Arthur D. Little in our filing.

Q. Did you tell them at that meeting that in your view perhaps the rates weren't as high or didn't induce as much profit as you would have liked?

A. Definitely. I tried to give them the history of what we, as the industry, where we were in the previous five years as far as the industry and the tough time that some of the companies were having.

Q. Did the Connecticut Insurance Department people make any suggestion to you that they wanted something more formal and elaborate in terms of the data backup before they—

[2314] A. Exactly right, they said you are going to have to have a lot of backup information insofar as justifying the rate increase.

Q. But you had already gone ahead—

A. We had done this anyhow. We weren't sure at the time when we had the Arthur D. Little study whether we were going to use it in the matter of a rate. We wanted to know for ourselves which way we were going. So we had the study done, we spent \$10 or \$15,000 to have the study done.

\* \* \* \* \*

TESTIMONY OF IRVING PLOTKIN  
JUNE 18-19, 1986

[2377] Q. For the record, sir, would you please state your full name and business address?

A. Irving H. Plotkin, 25 Acorn Park, Cambridge, Massachusetts.

Q. By whom are you employed?

A. The Arthur D. Little Company.

Q. Would you briefly explain for us the general nature of the business of the Arthur D. Little Company which, incidentally, I assume, we can refer to occasionally as ADL?

A. Yes, we can. I am under oath to tell the whole truth, I suppose. At one point our president objected to that short form because our Arab clients confused it with the Anti-Defamation League. From my point of view I would prefer you call it ADL.

The business is not easy to describe. We are celebrating this year our 100th anniversary. We are a contract research firm started by a gentleman, Arthur D. Little, in 1886 to do analytical and physical chemistry analysis on a contract basis.

Since then the company has grown both in number of employees and in scope of work so that we do scientific and economic research on a broad variety of [2378] issues. We have around 2500 in staff, many of whom have advanced professional degrees.

Our clients are worldwide. Our annual revenues last year probably exceeded \$215 million. About 20 to 30 percent of our work each year is typically done for the U.S. Government. Another 20 to 30 for foreign governments and organizations. The balance were foundations and corporations and other interests in the United States.

We work on a case team method pulling together interdisciplinary teams of scientists, various kinds of re-

searchers, supported by computer or laboratory techniques as desired.

[2406] Q. After the early experiences which you have referred to with state regulation of title insurance did you subsequently become directly involved with the state regulation of title insurance rates?

A. Yes, I did, sir, regulation and, if you use that word to mean also continuing oversight, not merely the approval of a particular rate or rate filing.

I was asked, I would suppose you might properly say by the Ohio Insurance Department, to work with their designated statistical agent, which was the rating bureau, but working as a statistical agent of the department to put into place statistical and financial reporting plans dealing with rates. Then came the assignments in Pennsylvania, much the same purpose, and a large number of other states, Wisconsin, Arizona, New York, [2407] Connecticut.

[2473] Q. Dr. Plotkin, as I mentioned right before the recess, I would like to turn now to the subject of the reporting system which you developed for use in the state regulation of title insurance rates. As I understand it, there were basically two kinds of plans of recording systems, is that right?

A. Yes, sir. The reporting system, we use that phrase to cover two separate sets of documents, sets of schedules, each of which constituted a plan, one a financial, sometimes called an income and expense plan, and the other a statistical plan. Together they constituted a reporting system.

Q. Let's take up, if we may, first of all, the income and expense or financial system.

[2474] Basically, could you describe the purpose of that aspect of your program?

A. The financial or income and expense reporting plan is a very large collection of schedules and documents and



instructions. Its purpose, however, is fairly straightforward.

By constantly narrowing down from a huge amount of information to a smaller and smaller and more compact information, the commissioner or regulator can quickly determine the level of the rate of return achieved by the title industry for selling title insurance in his state, in all other states in which the company does business as well as the average of those two, the nationwide average, and can do so both with respect to a very broad summary number like the rate of return and also with respect to any element on the income statement or the balance sheet.

He can separate out quickly also the returns coming from the operations, on the one hand, and from the investment activities of the company, on the other. That is the goal.

To accomplish that goal so that the answers can be simply and quickly looked at, the side of looking at maybe just a few pages, is something of about an inch thickness in terms of instructions and forms that the individual companies went through which, to be done for [2475] any one state, the essence required that it be done for all 50 states because embodied in it was what was known as a 50 state spread sheet which allowed the allocations to be made on a consistent basis over the 50 individual states.

These plans, the income and expense plans, were uniformly grounded in the data which the companies filed annually with all insurance departments in which states they had operations called the Form 9 or also called the title insurance annual statement, known as the title insurance blank, which recorded all financial data, income statement and balance sheet and investment activities and underwriting activities of the companies.

And there were many supporting schedules to show precisely how any final number in the income and expense plan could be traced back and reconciled with numbers in the Form 9. This was a very important part of the

request of all the departments I worked with, that such a paper trail, an audit trail be an important part of the plan.

\* \* \* \* \*

[2483] Q. Could we turn for a moment to the statistical plans. I would want to ask you to briefly describe them and state your purpose in developing a separate statistical plan.

A. The statistical plan is very, very different from the financial plan, both in what it is, how the data are collected and its purpose. Its purpose speaks primarily, although not exclusively, to that third leg or standard of insurance regulation, the not unfairly discriminatory.

The data in the statistical plan are necessary in order to assess the structure of the rates and the impact of any particular rate structure on the insurance buying public, how much revenue comes from various kinds of policies and of various coverage levels, \$5,000, \$10,000, owners versus mortgage, initial rate versus reissue rate, various kinds of endorsements, how many such policies are written, and does allow the construction of estimates based on a model of the economics of the [2484] industry of the profitability, in a sense, or the contribution margin, I really should say, of various classes of business.

The plans also gave data necessary to answer a very different kind of question, not what is the current cost subsidies from big policies to little policies, the current discrimination to rates, but if the regulator were presented with a rate filing which did not say, as many of them did, we propose to increase all rates 10 percent, which I will call a uniform increase rate filing, but a rate filing that says, we propose to increase mortgagor's insurance by \$5 a thousand, and owners insurance by 1 and lenders insurance by another, we propose to change the distribution of the rate so that policies above \$100,000 would be increased proportionately more than policies below \$100,000—and all of these things are things that



are actually done. I am not using them as examples, they are real world examples—to institute a uniform fee of \$5 per policy issued across the board no matter what the value of the policy.

You would need the data collected in the statistical plans to make reasonable estimates of the likely future impact on revenues and costs of proposed changes in the rating structure. You do not need it to [2485] make statements of the likely impact on revenues and costs of a uniform change but where you get the sophisticated changes, whether they are over the whole process or only over a small piece of the process, you need the statistical data to make, I believe, to make well-informed estimates of their impact.

\* \* \* \* \*

[2490] Q. The annual financial and statistical reports which were produced on a regular basis were eventually utilized by your recollection in approximately how many states?

A. You have in excess, I think, of 17 states that I know of directly that used financial and/or statistical data, at least financial and in some cases also statistical data in their regulatory processes. And I know there were other states that used it but that I was not directly involved in.

\* \* \* \* \*

[2577] It evolved to a more formal—well, it was a formal relationship. It evolved into more formal products when it was mutually determined that the gathering of financial and statistical data was desired by the regulator after a hearing held by them, felt necessary for their regulatory purposes. Though, interestingly, it did not stem from a concern of excessive prices. Perhaps I am rambling on too much.

It stemmed from a concern that it was obvious to them that profits were not excessive. However, they were concerned that that may well have been caused by excessive

costs in the form of commissions and the like and that really was sort of the first thing that focused [2578] on the trade practices.

\* \* \* \* \*

[2586] Q. Can you summarize for the court the nature of your testimony, at least by way of the subjects you discussed?

A. I discussed at length and in great detail all that I had come to understand about the economics of title insurance, the nature of the product, the nature of its costs and how this related to what was generally known about the rate regulatory process of insurance in general, what costs and what revenues, including investment revenues you bring to the table, how you can use investment income.

I spoke about many things at length in terms of the methodology of rate regulation and the use of investment income and rate of return that would not necessarily have been required of Stan DuRose himself who was, in fact, still the commissioner.

However, just before the hearing, maybe within the week or so that the hearing was to commence, a new commissioner had been appointed by the governor, Commissioner Wilde and Stan DuRose resumed his position as chief deputy. So Commissioner Wilde sat on the podium and Stan DuRose at his right hand and constantly sort of whispering to them and both of them asking questions.

And I remember Stan telling me before the [2587] hearing that this was a very good opportunity to give the commissioner his total education, the possible new commissioner, brand new to the job of being an insurance commissioner and new to insurance, as best I could tell, to give him his total education. While he may have been new to insurance, he wasn't new to economics and he asked many questions from the point of view of someone generally schooled in economics and political science.

Q. Do you recall that you mentioned that Commissioner Wilde and I guess at that time Deputy Commis-

sioner DuRose was present representing the department at that hearing. Were there other members of the department present?

A. Yes, there were a large number, both on the podium itself and in the hearing room sort of around the sides. I really should say to be frank, this was the new commissioner and maybe some members of the department turned out to observe him at close range first hand. And this is one of his first public undertakings.

Q. Do you recall whether ADL completed the design of a financial and statistical reporting system for use in Wisconsin?

A. Yes, sir. Working with the insurance department and the bureau, we constructed both a financial reporting plan and a statistical reporting plan.

[2605] Q. Dr. Plotkin, as you observed the regulators over the period of time we have been talking about, is it your opinion that the State of Wisconsin was actively regulating title insurance rates in the State of Wisconsin?

MS. BAULIG: Objection.

JUDGE NEEDLEMAN: What is the objection?

MS. BAULIG: I think it would be appropriate to hear what Dr. Plotkin testifies as to what they did, rather than what his opinion is as to actively regulating.

JUDGE NEEDLEMAN: The objection is overruled. The expert may testify to the ultimate legal issue in the [2606] case under modern practice under the federal rules. You may answer the question, Mr. Witness.

THE WITNESS: Yes, sir. At the highest level, at the commissioner's level, they carefully looked at, understood, questioned all the aspects of the operation of the industry, the data that was submitted. They were not even satisfied to go with the industry's, if you will, quick and dirty version of the pro forma analysis one year after having a full-blown version and asked: Well, does this person, if I may say it, propose some confidence and what is his opinion on it?

I would say that that is what I as a regulatory economist would consider active regulation and conscious regulation, regulation with understanding, not just a form of regulation.

Q. Dr. Plotkin, were you and Arthur D. Little [2607] engaged to assist in the process of title insurance rate regulation in the State of Arizona?

A. We were, sir.

[2611] Q. Do you recall any subsequent discussions on the subject of a possible rate hearing either with Commissioner Trimble or his successor?

A. Well, he was succeeded, I believe, by Commissioner Low, Mike Low, who became very, very interested in all matters relating to title insurance, not only the rates and statistical and financial plans but more importantly why the profitability was not greater. This was something that sort of begged for explanation.

[2614] Q. I take it that financial and statistical plans were ultimately prepared by Arthur D. Little and submitted to the department?

A. Yes, sir, although it was more interactive. Drafts were submitted. We showed them models used in other states and ultimately a final form of each plan was printed up by us and submitted to both the bureau and the department.

Q. Did the department accept the plan ultimately for utilization in Arizona?

A. They accepted them and they understood and encouraged cooperation on the part of the companies. I reported to them that the companies had told me they would fill them out.

There is also a hiatus. You put the plan in effect but you don't know until you actually get the data whether the companies are going to cooperate.



[2617] Q. Let me ask you briefly, Dr. Plotkin, to turn to the exhibit which has been identified in the record as RX-92. This appears to be an economic analysis of the Arizona title insurance industry bearing the date of September 1980 for the years 1972 through 1979.

Would you describe this document?

A. Yes, sir. This is, as you said, an economic analysis, meaning it contained both statistical and financial results. It was, I believe, the first year in which we had the statistical results and as such, if you notice, it is stamped "draft." And the cover letter on your exhibit is a letter where the president of the rating bureau was sending the draft at our request to all member companies.

We noted to him that based on some recalculation there was a change of one decimal point in one number on one table but the main point is we wanted the companies to carefully go over the statistical data and the appendices laying out the codes to be sure that they were reporting to us under the right codes and that they were [2618] willing to sign off that this fairly represented what they were reporting to us.

I believe that other than the arithmetic changes, that this was the final document, that this per se, these pieces of paper are the final document.

Q. It is your testimony that this is a draft of a report, an additional report which was ultimately submitted to the insurance department with the changes you referred to?

A. Yes, sir.

Q. Let me then ask you to turn to RX-493. Is RX-493 the last in the series of the economic analysis reports prepared by ADL and submitted to the department?

A. It is the last I have in front of me now and I believe it may have been last in the series but again, without checking records, I can't answer that for you definitively.

Q. Would you turn to Table 7 on page 11 of this exhibit and also look at Table 10 on page 4? I am sorry, Table 10 must be on a different page. It is page 14.

What do these tables represent?

A. They set out the rates of return on total capital as calculated by us, achieved on the one hand in Arizona by the title insurers in Arizona, and, on the other hand, in Table 10 by those companies reporting [2619] under the FTC/SEC data collecting reporting system.

Q. And they do so for the years during which you were preparing all of these reports and for an average, a nine-year average, is that correct?

A. Yes, sir.

Q. Based on the rates of return evidenced by these tables and the underlying data contained in this report, were you able to reach an opinion as to whether the rates in Arizona during this period of time were excessive?

A. Yes, sir, although the basis of such an opinion was not merely the data in this report, also my background understanding of rates of return achieved by alternative investments and the relative riskiness of various kinds of investments, corporate and instruments.

Q. All right. Based both on these reports and the other understanding or knowledge which you came to have about Arizona, is it your opinion as an expert in the state regulation of title insurance rates, would it be your opinion that these rates of return suggest any basis for questioning whether the rates were excessive during this period of time in Arizona?

A. I think, while the question is fair to ask, studying the achieved returns, looking at the volatility would lead to the answer that there is no evidence of excessivity. Again, for many of the reasons, although I [2620] would point out that the achieved returns here were higher than the achieved returns we looked at in the other states, they were equally volatile and they were still below what would be a very conservative standard, one possible standard, the average for FTC/SEC. Also, we are now into the period of high inflation, high interest rates, high alternative rates of return for alternative investments.



And all that has to be brought into actually answering the question.

. . . . .

[2621] Q. Dr. Plotkin, do you recall the circumstances which led to the termination of the financial and statistical reporting systems which you had developed for the regulators in Arizona?

A. Yes, sir. It is simply you can't make bricks without straw. The molds remain. The systems remain. The companies informed me on advice of their outside counsel, antitrust counsel, that they were unwilling to supply the data to me that I would then aggregate and give to the insurance department because of an order issued by, I believe, Judge Muecke, I believe his name is Muecke, his last name was Muecke, Federal Judge Muecke.

Q. Do you recall discussing these circumstances with Commissioner Low?

A. Yes, quite vividly because he expressed, as did I, a certain degree of frustration. He clearly wanted the data for his purposes of continuing to monitor the industry, making the record in his department of what was happening.

[2622] He wanted the companies to supply the data and they kept on saying, well, they couldn't unless they got some protection, some orders, some document. He was trying to work with his attorney general and the attorney general's office to write something, take it to the Judge to sign.

There was a question of if he appointed us directly his statistical agent rather than having the bureau be the statistical agent and the bureau retain us, whether that could make a difference, various avenues were discussed, lots of time was discussed on how the bridge could be crossed.

I pointed out that time was of the essence, especially the statistical data could not be recaptured without huge economic expenditure if it was not gathered currently, contemporaneously. The financial data could be recap-

tured with maybe just a little cost and accuracy. And he certainly was trying every which way to see. He was thwarted, however, by the adamants, as I understood it, of the counsel of the company interpreting Judge Muecke's order and the inability of the state attorney general to be willing to work out something that would give the protection to the companies they felt they needed.

I cannot tell you all the details of that but I [2623] knew the implications were that you couldn't get the data. He wanted the data. There was nothing I could do or he could do to obtain the information.

. . . . .

[2624] Q. Dr. Plotkin, is it your opinion, based on your experiences and your observations in Arizona over the period of time we have been discussing, that the state regulators of title insurance in Arizona were actively regulating rates for title insurance in that state?

A. Yes, and in much the same way that I answered that question with respect to Wisconsin. At the highest level, the commissioner was involved, aware, intellectually cognizant of all the aspects of the regulated companies.

. . . . .

[2625] Q. All right. Let me show you a document which has been identified as CX-30-A in this proceeding which I gather is a covering letter with a number of attachments.

My question is simply whether this document and its sub-parts, whether it contains a report prepared by Arthur D. Little?

A. As I read this entire document, it is a cover letter enclosing three items. One and only one of those items was prepared by Arthur D. Little, namely the item identified as Appendix A, which is the profitability analysis for the years '76 through 1980.

Arthur D. Little had no involvement with the materials identified as Appendix B or C.

Q. All right. Let me ask you to look at table 4-A of your report, which I believe is on page 21. And if you could, at the same time, look at the table on page 27, [2626] which is Table 5.

A. I have those two, sir.

Q. Those tables represent what sort of information, Dr. Plotkin?

A. They present our calculations of the return on total capital achieved by the Connecticut title companies in Connecticut for the years '76 through '80 and gives the five-year averages and then presents for the year '68 through '80 our calculation of the return on total capital of FTC/SEC companies and also gives an average for the same years as those in Connecticut in '76 through '80 and the years '70 through '80.

Q. Looking at these tables and more specifically at the rates of return reflected therein, are you able to reach any opinion as to whether the rates in Connecticut represented by this period of time were excessive?

A. Yes, sir.

Q. Would it be your opinion as an expert in state regulation of title insurance rates that these rates of return suggest any basis for questioning whether the rates were excessive?

A. I sort of lost the sense of whether it is a yes or no but I find no basis in the observed profitability stemming from the rates to suggest that the rates are excessive. And again I think the graph at page 28 is [2627] useful, as are some of the other graphs, such as the graph at page 26 in helping to understand how I reached that answer.

\* \* \* \* \*

[2691] Montana had an extensive hearings and they brought in the chief deputy from California, who had just recently retired from that position, to be their special hearing officer on the whole nature of title insurance.

In fact, the presentation I made before him was identical to the presentation I made yesterday here, the whole economics of title insurance and then specifically how it relates to the controlled business problem and whether title rates are unduly inflated by controlled business.

The interest, I should say, of the insurance commissioner in controlled business is only really, not to make value judgments if someone is unduly enriching themselves but whether that inflates the price of insurance unduly.

\* \* \* \* \*

[2717] Q. So I gather that although the original purpose for the convention of this proceeding was to consider the controlled business issue, that this proceeding, like other controlled business proceedings, also included a discussion of profitability of title insurers?

A. And their rates, yes, sir.

Q. Would it have been fair to have characterized this proceeding as, I believe you characterized some of these proceedings generally as what I think you called in your cross-examination a mini-rate review?

A. Let's say a back-door rate review, that the current level of rates were passed in a review by looking at profitability issues in order to really—I brought that up to contrast it with the profitability of these controlled business agencies which got the retentions and had very little expense.

\* \* \* \* \*

## TESTIMONY OF WALDO R. DI SANTO

JUNE 20, 1986

\* \* \* \* \*

[2724] Q. Could you please state your full name and business address for the record?

A. My name is Waldo R. DiSanto, D-i-S-a-n-t-o. I am director of the Property and Casualty Rating Division, Connecticut Insurance Department, Address 165 Capital Avenue, Hartford, Connecticut 06106.

Q. Could you repeat again what is your title with the Insurance Department?

A. Director of the Property/Casualty Rating Division.  
[2725] Q. Does this division have regulatory supervision over title insurance rates?

A. Yes.

Q. What exactly are your functions as director of the Property and Casualty Rating Division?

A. To review filings and submissions made by insurance companies, rating organizations, to determine whether the filing conforms with the statutory standards of Connecticut law.

Q. Could you tell me what those statutory standards are?

A. Yes. The primary standard are that rates shall not be excessive, inadequate nor unfairly discriminatory.

\* \* \* \* \*

[2736] Q. Do you recall receiving the 1981 request for a rate increase?

A. Yes.

Q. Do you recall prior to receiving this request for a rate increase meeting with any members of the Connecticut Board of Title Underwriters to discuss the possible need for a rate increase?

A. Yes.

Q. Can you recall the general substance of this discussion, I am sorry, let me back up.

[2737] Can you recall offhand who the people were that you met with?

A. I can recall one of the gentlemen. I believe Mr. Bob Anderson. That is all I can remember in names at this time.

Q. Do you remember the substance at all of these discussions?

A. The substance of the discussion was the general problems of the industry, the need for more revenue, the state of the real estate market at that time, interest and inflation and those kinds of things.

Q. Do you recall offhand having discussed any other method of tackling these problems other than a rate increase?

A. Yes.

Q. Can you just generally tell me what the nature of that discussion was?

A. The discussion centered around the expense component in the rates, more specifically the, in my terms, the disproportionate allowance for commissions paid in connection with title insurance.

Q. And can you just explain very briefly, I think I will discuss this in more detail later, why the issue of commissions was relevant to the concerns that were raised at the meeting about the title insurance industry at the [2738] time?

A. Well, in the one case the increase in revenues in insurance is made by increasing the rates, which ultimately increases the premiums, which reflect the component costs of the various expenses of doing commission, or of doing an insurance business, less a loss adjustment expense.

In title insurance the expense component, primarily because of very high, in my view, commissions, leave a short balance of available dollars to pay the primary function of insurance, the risk element and the loss adjustment expenses.



JUDGE NEEDELMAN: Excuse me. Read the last phrase back, Mr. Reporter.

(The reporter read the record as requested.)

JUDGE NEEDELMAN: Continue your answer, Mr. DiSanto.

THE WITNESS: Briefly I think that that is my answer, Your Honor.

JUDGE NEEDELMAN: Continue.

BY MR. RUDOLPH:

Q. Did you suggest at this meeting that perhaps efforts should be made to try to control that element of insurer's costs?

MS. BAULIG: Objection, leading.

[2739] JUDGE NEEDELMAN: Objection overruled. Continue.

BY MR. RUDOLPH:

Q. You can answer the question.

A. Would you please repeat the question?

Q. Did you address with the people with whom you met at this time possible methods of trying to control what you perceived to be these excessive commissions?

A. Yes, commissions, in my view, commissions in the title insurance system have kind of been a sour point, if I can describe it that way, and it has been kind of a constant item for discussion when I meet with or when I had met with title insurance people, the rating organization member representatives.

And I had discussed alternative ideas to reflect or to limit a more appropriate, in my view more appropriate, commission expense.

\* \* \* \* \*

[2741] Q. Do you recall your reaction when you received this filing?

A. Well, it is a voluminous and complex document. I guess my reaction is that it is going to take some time to review and resolve.

[2742] Q. Focusing on the filing itself, did the rate filing that you received contain any justification for the proposed increase, support or justification?

A. I believe it does, yes, sir.

Q. Did it contain any analysis that supported, that attempted to support the requested increase?

A. Yes, sir, I would say yes.

Q. Let me draw your attention—I am sorry, go ahead.

A. My recollection is that the document is well supported and detailed.

\* \* \* \* \*

[2743] Q. Did you review this justification during your consideration of the proposed rate increase?

A. Reviewed this document, yes.

Q. Could you describe for me generally your process of reviewing this document?

A. We review the submission, we read it, review it, take notes, make notes. If we have any questions, if we find any questions we don't understand or we find any errors, to that extent we seek additional information, discuss it with other people on our staff, et cetera.

Q. Could you tell me, if you know, who prepared the supporting material?

A. Arthur D. Little Company.

Q. Did you have any cause to doubt the accuracy of the figures used by Arthur D. Little to support its conclusion about industry profitability in Connecticut?

A. Could you please repeat that question?

Q. Sure. Did you have any cause to doubt the accuracy—I will tell you what, why don't I take a step back and ask you another question to help you out.

Upon review of this filing and the supporting materials, what was your conclusion about the need for a proposed rate increase by the title insurance companies?

A. Well, based on the documents in the entire filing, that I believe this supported the need for— [2744] satisfied the requirements of the statute in connection with the filing of rates or rate increases, sorry, filing of rate increases.

Q. Did you have any cause to doubt the accuracy of the figures used by Arthur D. Little to support its conclusions reached in the justification that you received?

A. No, sir.

Q. Did you have any cause to challenge Arthur D. Little's statistical reporting plan contained in that filing?

A. In balance I felt that the document supported the proposed increase, was well documented and would support, and on that basis it was accepted for its intended purpose.

Q. Do you recall if anyone else in your department reviewed this filing?

A. Yes, I do. I do recall. A Mr. Walter Bell of our department reviewed it, did look at it, yes.

Q. Did you discuss this filing with him or anyone else in your department?

A. I cannot recall the extent to which I may or may not have discussed it with anyone else.

Q. In your view as a person responsible for rate review and approval in Connecticut, did this filing [2745] satisfy the requirements of state law concerning title insurance rate filings?

A. Yes, sir.

Q. Was this filing ultimately approved?

A. Yes, sir.

\* \* \*

[2747] Q. Do you believe that your review of this filing was sufficient to satisfy your obligations under the insurance statutes and regulations of the State of Connecticut?

A. Yes.

Q. Has anyone with any Insurance Department, the State Government or anywhere in the state ever suggested

that your review of this rate filing fell below the standards specified by state law for review of rate filings?

A. No one has suggested that.

\* \* \*

[2756] Q. Can you review that document very quickly and tell me whether this document refreshes your recollection as to whether or not you met with anyone at the CBTU concerning the 1983 filing?

A. Yes, I remember now, yes.

Q. Can you just briefly relate, if you recall, the nature of the discussions you had at your meeting with the Connecticut Board of Title Underwriter representatives?

A. Again, one of the things discussed was the impact of commissions and a discussion of alternative means that could effectively address the disproportionate expense loading for commissions.

Q. Do you also recall having discussed the filing [2757] itself at this meeting with these representatives of the CBTU?

A. May I dig out the filing that this is referring?

Q. Yes, please. That is CX-32-A through CX-32-X.

A. Yes. A Mr. Bell also worked on this filing, Mr. Bell with our department.

\* \* \*

Q. Other than the three filings that we have discussed this morning that we have delved into, were there filings by the CBTU that affected forms of coverage or had any effect on rates for specific types of coverage?

A. Yes, I can recollect there was a zoning [2758] endorsement, a variable rate endorsement and a condominium endorsement.

Q. These were endorsement filings?

A. Yes, but endorsement filings can sometimes affect the rate, okay, or the price, the price, the ultimate price of the premium, yes.

Q. And in addition to these endorsement filings were there form filings by the CBTU over the years that you have been regulator?

A. Yes, sir.

Q. Did you review all of these filings, I am sorry?

A. I myself or the department reviews every filing that we receive, yes, sir.

Q. Is there any method that you employ within your department to especially demonstrate that you have reviewed and approved such filings?

A. After a filing is approved or accepted or disapproved, the evidence of its approval is a stamp with the name of the person who has reviewed it indicating a date.

The disapprovals generally are accompanied by a written letter or, in some cases, we make a notation on the filing itself disapproved, see attached, withdrawn, see attached, okay.

Q. If a filing has a stamp and a signature of [2759] approval on it from your department, does this demonstrate that the document has been reviewed by your department?

A. Yes, sir.

Q. Can you define or describe for me generally what an endorsement filing is, specifically with respect to title insurance business?

A. An endorsement is an addendum or a rider to a standard policy form which amends or modifies the policy document. It obviates the need for then incorporating the addendum language into a new policy.

Q. Are these endorsement filings reviewed by someone in the department?

A. Yes, sir.

Q. Do you employ the same method of stamping these if you approve of them upon review?

A. Yes, we use the same procedures with endorsements as policy forms or even rate filings.

Q. Are you familiar with any endorsements filed by the Connecticut Board of Title Underwriters that were disapproved or otherwise challenged by your department?

A. The variable rate endorsement, a zoning endorsement, condominium endorsement were either revised, withdrawn or disapproved.

\* \* \* \* \*

[2771] Q. Do you believe that the Insurance Department reviews and supervises rate and form filings of title insurers in Connecticut in a manner that is consistent with the state statutory requirements?

A. Absolutely, yes.

[2772] Q. I believe you testified earlier that in excess of 2,000 insurance filings come through your office every year, is that correct?

A. That is correct, yes.

Q. Your department reviews all of those filings?

A. Every single one, yes.

Q. Does your department devote the same amount of time and resources to each of these filings?

A. Obviously not. The filings have different significance. One filing may involve \$400 million of insurance premium a year. Another may be an endorsement which just changes, a policy form which changes the logo of the company or the name or address.

Q. Do you feel that it is part of your responsibility as an insurance regulator to determine which of the many filings that you are asked to review may merit greater or lesser scrutiny?

A. Yes, sir.

Q. Do you believe that it is consistent with your role as a regulator to determine to devote less time on one filing than you would on another?

A. Yes, sir.

\* \* \* \* \*



**TESTIMONY OF WALTER SHAW BELL**  
**JUNE 20, 1986**

\* \* \* \* \*

[2824] Q. Mr. Bill, would you please state your full name and business address for the record?

A. My name is Walter Shaw Bell. My business address is 165 Capital Avenue, Hartford, Connecticut, insurance department.

Q. Are you currently employed?

A. I am currently employed by the insurance department in the State of Connecticut.

Q. What is your title at the insurance department?

A. I am an associate examiner in the casualty property rating division.

Q. And can you please tell me what your [2825] responsibilities are as an associate examiner?

A. My responsibilities are to review rate rule and form submissions from insurance companies for a variety of lines of business and to take appropriate action in connection with them.

\* \* \* \* \*

[2826] Q. Mr. Bell, were you at the department when the Connecticut Board of Title Underwriters filed for a 20 percent across the board rate increase in 1981?

A. Yes.

Q. Do you have any knowledge as to how long it had been since a prior similar increase had been sought if at all by the Connecticut Board of Title Underwriters?

A. I believe that was the first filing in 15 or 20 years.

Q. Did you have any responsibility for reviewing the 1981 rate filing by the Connecticut Board of Title Underwriters?

A. Yes.

MR. RUDOLPH: Off the record.

(Discussion off the record.)

JUDGE NEEDLEMAN: Back on the record.

BY MR. RUDOLPH:

Q. Do you recall receiving this filing when it came in in 1981?

A. Yes.

Q. Do you recall what your reaction was when you saw this filing?

A. That it was a significant increase that was [2827] being requested and one had not been made before.

Q. Can you find in your materials there a document numbered CX-30-A through CX-30-Z-98. It is a thick document.

A. Yes.

Q. Have you got that in front of you?

A. Yes.

Q. Is this the rate filing to which we have been referring in previous questions?

A. Yes, it is.

Q. Did you personally review this rate filing?

A. Yes.

Q. Can you describe for me the steps you took in reviewing this filing?

A. Yes. I read through the cover letter from the Connecticut board and I read the information that was attached to it.

Q. When you say you read the information that was attached to it, did you read the report that has been referred to as the Arthur D. Little report?

A. Yes.

Q. Did you read this complete report from cover to cover?

A. I believe so, yes.

Q. Do you recall any conclusions that you reached [2828] upon completion of your review of this filing?

A. I recall thinking that it was a charge that was not too significant in the total dollars and it reflected, I made a comparison against a previous filing during the year on variable rate mortgages.

Q. And what was your conclusion as to whether or not you felt that the request for the 20 percent rate increase was justified?

A. My conclusion was it didn't appear unreasonable.

Q. You testified that you recall reading the cover letter that came with this filing?

A. Yes.

Q. After your review of the justification submitted with the filing, did you believe that the cover letter set forth an accurate assessment of the CBTU's apparent need for the rate increase?

A. Yes.

Q. Do you recall discussing this filing with Mr. Di-Santo at all during the course of your review?

A. Yes.

Q. Do you recall specifically what you might have discussed?

A. I believe I discussed the thickness of the filing and time involved in reading it. I believe I took it home, I can't recall for certain whether I had taken [2829] the filing home to read. And I believe I said it took time.

Q. Did you say, you said the thickness of the filing?

A. Yes.

Q. Do you believe that your review of this filing was sufficient to satisfy your obligation as an employee of the State of Connecticut Insurance Department?

A. Yes.

Q. Do you believe that your review of this filing was sufficient to satisfy your obligations under the insurance statutes in the regulations of Connecticut?

A. Yes.

Q. Did you have any cause in the course of your review of this filing to call into question the accuracy of any of the figures that were provided by Arthur D. Little in the justification that was filed with the filing?

A. No.

[2831] Q. Did you have any cause to question the conclusions that were reached in the Arthur D. Little report

concerning the profitability of the title insurance industry in Connecticut during the period covered by the report?

A. I am sorry. Could you repeat?

Q. Did you have any cause to question the conclusions that were reached in this report concerning the profitability of the title insurance industry in Connecticut during the period that was covered by the report?

A. No.

. . . . .

[2833] Q. I would like to turn now briefly and talk about a 1983 filing by the CBTU and ask you a few questions about that, if I might. I would like for you to look at a document labeled CX-32-A through CX-32-X. Have you got that?

A. Yes, sir.

Q. Did you have any responsibility for review of this filing?

A. Yes, I did. I reviewed it for the department.

Q. Can you tell me what this document represents?

A. It is a filing by the Connecticut board to make various changes in its manual for providing title insurance. It removed the all-inclusive rate structure from the manual and amended certain other pricing [2834] mechanisms within the manual.

Q. Do you recall why the all-inclusive rates were being removed from the CBTU manual in this filing?

A. I believe it was to update the manual to reflect the fact that the title insurers in Connecticut no longer employed an all-inclusive rate structure. The business did not operate in that manner.

Q. Did the removal of the all-inclusive rate result in any change in the basic rate that existed in 1983 in the manual?

A. No.

Q. Did you deem it necessary to engage in any analysis of the propriety of the approved attorney rate that remained in the 1983 filing?

A. No.

Q. Why was that?

A. We generally only review a filing submission to review the change that has occurred. We receive an enormous number of filings each year. We don't go back and review something that has already been done generally.

Q. This rate was already in effect?

A. Yes.

Q. Did you perceive of this filing as a mechanism for bringing more revenue into the title insurance companies or rather simply as an effort by the CBTU to [2835] update the language of its manual to current industry practice?

A. Principally updating of the manual.

\* \* \*

[2842] Q. Do you believe that the insurance department reviews and supervises rate and form filings of title insurers in Connecticut in a manner that is consistent with the statutory requirements?

A. Yes, sir.

Q. You testified earlier that you see about 2,000 filings come through your office in the course of a year, is that correct?

A. Yes, sir.

[2843] Q. Do you review all of these filings? Does your department review all of these filings?

A. Yes, sir.

Q. Does your department devote the same amount of resources and time to each of these filings?

A. No. The amount of time depends on the need for the individual filing and judgments made based on what the filing proposes to do.

Q. In your view, are these judgments a part of your function as a regulator in the State of Connecticut?

A. Yes.

\* \* \*

# TESTIMONY OF ROBERT STATTON

JUNE 30, 1986

\* \* \*

[2853] Mr. Statton, will you state your full name and business address.

A. Robert L. Statton, 13640 Roscoe Boulevard, Panorama City, California.

Q. By whom are you employed?

A. SAFECO Title Insurance Company.

Q. How long have you been an officer of SAFECO Title Insurance Company?

A. A little over 30 years.

Q. How long have you worked with the Title [2854] Insurance Industry?

A. A little over 40 years.

\* \* \*

[2855] Would you describe your involvement with the Montana Rating Bureau?

A. I was Director of the Montana Rating Bureau.

Q. For how long did you serve on the Board of Directors?

A. From its organization until the company resigned.

\* \* \*

[2858] Q. You mentioned a meeting with the Insurance Department officials in connection with this filing.

Could you describe that meeting, what occurred?

A. Yes. That was on February 22, 1983. I went to Helena, Montana, and met with Sonny Omholt who was then Director of the Insurance Department, the Commissioner. I told him the purpose of my visit, talked in general for a little while. Then he stated Mrs. Erickson was actually in charge of the title insurance and title insurance rate filing. He escorted me over to her office, stayed for a couple minutes, and left me with Mrs. Erickson.



Q. Did you discuss the filing with Mrs. Erickson?

A. Yes. We took a look at the filing, discussed the filing for a while, talked about its contents and discussed also what type of justification they would want as far as statistics.

Q. Can you amplify what sort of justification you discussed?

A. In addition to the items that were in my letter, the Rating Bureau had in the final paragraph of the letter said that they would gather some statistics. We had to be certain that the statistics we gathered [2859] were compatible with that of the Insurance Department.

At that particular time the standard for financial data had been somewhat standardized into an American Land Title Association format of financial gathering. That was the same format they were interested in.

In other words, they didn't need policy type statistics or things like that. They were more interested in the financial statistics and it was finally decided that the ALTA format would be acceptable.

Q. Did the Rating Bureau implement this plan to collect data?

A. Yes.

\* \* \* \* \*

[2865] Q. [Y]ou delivered this filing on February 22, 1983; is that right?

A. That is correct.

Q. Now, prior to February 22, 1983, you did not have any meetings or other communications with anyone at the Insurance Department regarding this first filing by the Rating Bureau?

A. The only communication I had was to call the Commissioner and make the appointment.

Q. When you arrived at the Insurance Department, I believe you said you met briefly with the Insurance Commissioner, Sonny Omholt?

A. Correct.

Q. You did not discuss the substance of the rate filing?

A. No.

Q. He directed you to Mrs. Erickson as the person who dealt with title insurance?

A. Correct.

Q. You had no other meetings at any time with Mr. Omholt concerning anything to do with the Rating Bureau; is that right?

A. That is correct.

Q. Your only meeting with Mrs. Erickson [2866] concerning the Rating Bureau was this meeting on February 22, 1983, when you brought the filing identified as CX-41-A through W [Letter from Robert Statton to Montana State Auditor and Commissioner of Insurance, dated February 18, 1983, with attachments.]?

A. That is correct. I had one subsequent telephone conversation with her.

Q. In that telephone conversation, I believe you called Mrs. Erickson to tell her there was an error in the filing?

A. That is correct.

Q. Then you also sent Mrs. Erickson a letter that same day with a new page?

A. I did.

Q. That is the other conversation you were speaking of?

A. That is right.

Q. Apart from that phone conversation and meeting on February 22, you had no contact with Mrs. Erickson?

A. No.

Q. Now, Mrs. Erickson had not seen this filing prior to the meeting?

A. She had not.

Q. Yet a stamp on the upper right-hand corner of CX-41-A was placed on the document while you were still at the Insurance Department on that day that you delivered the filing; is that right?

[2867] A. That is right.

Q. CX-41-B, the second page of your cover letter and the next couple of pages contained a discussion of title insurance industry profitability; is that right?

A. That is correct.

Q. All of the profitability figures and all of the statistics in the cover letter are national figures?

A. Yes.

Q. You did not compute the profitability of the Montana operations of the Rating Bureau members?

A. I had nothing to compute them with unless I gave them our own company's, because there is no way you are going to trade statistics, we just don't share our own operating figures.

Q. So, this document that you provided to the Insurance Department did not contain Montana statistics?

A. That is correct.

Q. You did not provide the Insurance Department with expense data for the Montana Operations of the Rating Bureau members?

A. That is correct.

\* \* \* \* \*

[FTC COMPLAINT COUNSEL'S TRIAL EXHIBIT  
CX 30 A, B]

CONNECTICUT BOARD OF TITLE UNDERWRITERS

5 Landmark Square, Suite 200

Stamford, Ct. 06901

(203) 964-0180

December 3, 1981

The Honorable Joseph C. Mike

Commissioner of Insurance

State of Connecticut Insurance Department

P. O. Box 816

State Office Building

Hartford, Connecticut 06115

Re: Connecticut Board of Title Underwriters  
Rate Filing

Dear Sir:

The Connecticut Board of Title Underwriters ("the Board") hereby proposes an overall rate increase of 20 percent to become effective on or about December 20, 1981.

As you may know, the Board has not increased rates since its original rate manual was adopted in August, 1966. Since that time, every effort has been made to hold down costs and expenses so that title insurance protection could be made available to Connecticut consumers at the lowest possible price. However, recent substantial losses of member companies mandate the present increase.

The Board recently retained Arthur D. Little, Inc. ("ADL") to conduct a study of the profitability of the Connecticut title insurance industry. Enclosed as Appendix A is a copy of ADL's report dated August, 1981 ("ADL report").

The ADL report demonstrates (see pages 21 and 24) that our industry earned an after-tax rate of return on total capital of only 2.40 percent for the years 1976

through 1981. By comparison, the average rate of return on total capital earned by other private enterprise companies for the same period was 12.01 percent (pages 25 and 27). In the latest year, 1980, the Connecticut title industry earned only 0.98 percent on total capital, while other enterprises earned 11.54 percent. (Pages 21 and 27).

It will be noted that the above rates of return for our industry are based on total rate of return, including investment earnings. If only underwriting profits and losses are considered the results are even more dismal. In the latest year, our industry sustained a net pre-tax operating loss of \$599,113. The five-year composite shows a pre-tax operating loss of \$846,471. (ADL report, pages 15 and 24).

The ADL report also shows that inflationary pressures on title industry expenses have not been offset by similar pressures on real property values. While the rate structure does incorporate an increase in policy price with increasing amount of insurance, the rate of increase in revenue is substantially less than the rate of increase in real property prices. (ADL report, pages 36-37). Furthermore, the comparative rate of return figures in the ADL report take into account income from all sources, including such additional revenues as are generated by the portion of the policy charge which increases with higher real property prices.

Enclosed as Appendix B is a statement of the projected effect of the proposed 20 percent rate increase. It will be noted that, even with the increase, the industry can expect to incur a pre-tax operating loss of \$366,397, and that, taking into account investment income, the anticipated total rate of return on total capital will be only 2.78 percent. Obviously, such projected profitability is not deemed adequate by member companies. Nevertheless, the Board does not deem it advisable at this time to impose on consumers an increase in rates greater than the proposed 20 percent.

Enclosed as Appendix C is a draft amended Rate Manual reflecting the 20 percent rate increase. Definitive copies will be filed with your Department upon the effective date of the increase.

Kindly acknowledge receipt of this filing by signing the enclosed copy of this letter.

Very truly yours,

/s/ Thomas M. Ferraro  
THOMAS M. FERRARO  
President



**[FTC COMPLAINT COUNSEL'S TRIAL EXHIBIT  
CX 41 A-E]**

**SAFECO**

Home Office  
SAFECO TITLE INSURANCE COMPANY  
13640 Roscoe Boulevard  
Panorama City, California 91409  
P.O. Box 2233  
Los Angeles, California 90051

INSURANCE DEPARTMENT  
STATE OF MONTANA  
REVIEWED AND FILED  
FOR INFORMATIONAL PURPOSES  
Date FEB. 22, 1983  
E. V. "SONNY" OMHOLT  
STATE AUDITOR AND  
COMMISSIONER OF INSURANCE

February 18, 1983

Mr. E. V. "Sonny" Omholt  
State Auditor and Commissioner of Insurance  
State of Montana  
Mitchell Building  
Helena, Montana 59604

Re: Amendment to Basic Title Insurance Rates

Mr. Omholt:

In compliance with Title 33, Chapter 16, Section 203 of the Montana Insurance Code, the Montana Title Insurance Service Organization hereby respectfully submits the following data, statistics and considerations used in the adoption of the title insurance rates submitted herewith, effective April 1, 1983.

Title 33, Chapter 16, Section 201 reads in part, in subsection (1) (a) rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.

Subsection (b) no rate shall be held to be excessive unless such rate is unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.

and Subsection (c) no rate shall be held to be inadequate unless such rate is unreasonably low for the insurance provided and the continued use of such rate endangers the solvency of the insurer using the same or if such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has or if continued will have the effect of destroying competition or creating a monopoly.

This criterion is the basis of the consideration used in the establishing of the title rates herewith submitted.

In 1981 Montana produced 0.23% of the gross national title fee's in the United States. In dollars, 1981 Montana title premiums were \$4,487,000.

Montana is classified as a "File and Use" rating state. As best can be determined, the current rates used by member companies came into use in 1966 and with the exception of the addition of minor changes in the application of the rate on specific coverages, have remained unchanged sine that date.

The use of a 1966 rate in todays economy makes the profitability of the Montana title insurance industry questionable. Solvency of the title insurance industry in Montana should be a consideration of great importance.

In maintaining a 1966 level rate, it is obvious that little if any consideration has been given to the fact that nationally, the title insurance industry lost \$63.6 million in 1980, \$110.3 million in 1981 and the figures for the first half of 1982 indicates an even poorer performance with a net pre-tax operating loss exceeding that of last year. What has caused this to happen? Accumulated data has shown that the housing industry has declined 41% from its peak period of 1978 through 1981. In 1981 home sales

were at the lowest point since 1970—"baby boom" entered the market.

It has been estimated that in 1981 alone, \$180 billion in housing sales were lost because of these factors and since the start of the housing recession in 1978, this figure is more than \$300 billion.

Without exception, the year 1981 was the worst year on record for the underwriters. Although I am not privy to agent's profitability figures, I have little doubt that their results were similar. Excluding investment income, the industry lost \$110.3 million in 1981. Pre-tax operating profits declined by more than \$161 million from 1979's figure of \$51.3 million, which was the last profitable year for the title industry as 1981 was the second consecutive year in which the industry lost money. 1981 was also the fourth consecutive year in which pre-tax operating profits decreased. The title industry has had a cumulative decrease of \$218 million since 1977.

In 1972, the pre-tax operating profit of the title industry was 16.9% and actual operating revenue has increased 131%. That sounds very good until the fact that operating expenses have increased 191% in that same period. All categories of expense have increased, some much greater than others.

Personnel costs have risen by 150%, non-personnel related costs and expenses have skyrocketed by 227%; and losses and loss adjustment expenses have increased by an astounding 393%. If those percentage figures were translated into constant dollar terms, while operating revenue has increased 7%, operating costs have increased 34%, personnel costs 15% and losses and loss adjustment expense 127%.

As indicated by the above figures, inflation, particularly the past inflation in housing prices, has tended to push up title insurance revenues, even when the number of transactions is decreasing. This happens because of the rate structure of the title insurance industry; however, because

of that same rate structure, the price of a typical title insurance policy rises only at best, two thirds as fast as the price of the property insured according to Dr. Nelson Lipshutz in his article entitled "An Analysis of Inflation and Profits in the Title Insurance Industry" printed in 1980.

At the rate hearings held in November, 1982, in Austin, Texas by the Texas State Board of Insurance, testimony was presented which indicated the title insurance industry in Texas has taken drastic steps to reduce expenses. Texas coincidentally has one of the highest title insurance rates in the United States. Most, if not all, of the underwriters represented at that hearing are qualified in the State of Montana also, and have taken similar actions. The steps taken were as follows:

Action Taken	% of Companies Taking Action
1. Cut-back in personnel	85%
2. Closing of offices	62%
3. Salary freeze or pay cut	54%
4. Cut-back in travel and entertainment	54%
5. Hiring freeze	23%
6. Shortened work week	15%

On a nationwide basis, the companies reported they had reduced staff by an average of 26%, while one company reported a high of 62%, and nationally had closed 12% of their offices while one company reported closing a high of 50% of their offices.

I submit to you that the title industry in Montana has not responded to the need for a substantial increase in the basic rate as well as the various minimum rates.

I base this statement on the profitability and cost figures herein before provided, and on the following:

The present rate structure in Montana has not kept pace with the inflationary trend and the cost of production and present loss experience.



Inflationary trends, even when partially off-set by drastic expense cutting moves by management, have within the last few years when coupled with the severe decline in available business, eliminated the profitability of the title insurance industry. The title insurance industry is not only a personnel intensive industry, but is subject to a great amount of fixed costs. It is not feasible to stop maintenance of a title plant when orders are slow. The cost of utilities, postage, rent, printing and all of the other items necessary to operate are not based on our profitability. They have all gone up far in excess in proportion to the average title premium.

Historically, losses and loss adjustment expense was a low single digit percentage item for several years in the title insurance industry, remaining well below 5% of the operating dollar in 1972 and prior years. The percentage figure crept over 5% in 1973 and has increased steadily until it reached 8.8% in 1981. All presently available indicators point to an over 10% loss ratio in 1982. Underwriters pay title losses, and increasing losses, not only in frequency, but in dollar amounts which have seriously eroded the underwriter's profitability. Loss prevention measures such as audits, supervision and training also increase the underwriter's burden. A static rate which has remained unchanged since late 1966 is not responsive to the solvency of the title insurance industry.

Data has confirmed the fact that losses and loss adjustment expense in the title insurance industry have accelerated at an alarming rate. In 1981 losses and loss adjustment expense exceeded \$100 million dollars, with an actual figure of \$112,500,000. Losses and loss adjustment expense is payment in today's income dollars for errors made in the past. Experience and analysis has shown loss will arise long after the policy is issued, and even though half of the losses occur more than three years after the policy is issued, a significant loss exposure exists after 10 years.

The ability to respond to those losses that will be paid at a future date on today's policies must be based on a company's future ability; and that future ability must be based on a better solvency. Income based on a rate established in 1966, when viewed and considered with the tremendous increase in operational costs caused by the inflationary trends of our economy will not stand the test of future solvency for the title industry.

During the next year the Montana Title Insurance Service Organization will make a call for statistical data and a profitability study from all underwriters and agents in Montana. These studies will be submitted to your department and should provide an excellent overview of the condition of the title insurance industry in Montana. If it was possible we would prefer to submit that data with this filing, but the time constraints of gathering, compiling and analyzing the information received would delay this request for a much needed rate adjustment approval too far into the future. We feel confident those studies will fully support this request.

Thank you,

MONTANA TITLE INSURANCE SERVICE ORGANIZATION

/s/ R.L. Statton

ROBERT L. STATTON

Chairman of Rate Justification Committee

RLS:lm

Attachments



[FTC COMPLAINT COUNSEL'S TRIAL EXHIBIT  
CX 91 Z-50, 103]

On the Theory and Practice of Rate Review and Profit  
Measurement in Title Insurance

Irving H. Plotkin

Arthur D. Little, Inc.

\* \* \* \*

Because the number of types of policies or basic rating classifications is generally quite large,<sup>40</sup> actuarially trained rate reviewers might be tempted to try to differentiate the insurance price by the average cost differentials of these several classifications. However, a number of economic and operational facts of title insurance preclude the success of such an attempt. The smallness of the loss ratio, the high proportion of fixed costs, and the lack of any consistent relationship between variable costs and type of policy issued (or the amount of its liability) make any cost allocation mechanism extremely arbitrary. However, even if none of the just mentioned factors were true, but only the cross-subsidy discussed above was considered socially desirable, any attempt at meaningful cost differentiation by policy type would be fruitless. Price differentials in most rate schedules reflect primarily legislative and regulatory social policies, historical practice, and the realities of the product market. Because costs cannot be meaningfully accounted for by policy type, rates cannot, in other than an arbitrary fashion, be made to reflect supposed differences in production costs.

\* \* \* \*

<sup>40</sup> Anywhere from 30 to 60 basic types, frequently with many possible special endorsements and charges.

[RESPONDENTS TRIAL EXHIBIT  
RX 60 A]

Mr. Sammy D. Sapp  
October 23, 1969

I have appointed a Committee which is working on a form for distribution to all underwriters for the purpose of obtaining experience as to the operating income and expense of title underwriters and agents operating in Arizona. This Committee is headed by James C. Wickline of Chicago Title Insurance Company, Phoenix branch office. Jim and his Committee have in their possession copies of the forms prepared by your office and have been working with them to determine if they can be used in our State, with certain minor changes.

As I discussed with you on the phone our situation here is not as complicated as yours in Texas, in that we only have two classifications, underwriters and agents, and all of the agencies agreements are exclusive. There is no uniformity as to the split between the agent and the underwriter.

The problem with which the Committee has had the most trouble to date is the question of division of expenses in connection with nontitle insurance functions, such as Collection Departments, Escrow Departments and Trust Departments. The former two are closely related to the title insurance operation, however, some of the companies operate personal trust departments which are not related to title insurance.

In 1968 when we were first required to file our rates the Rating Bureau filed the rates which had been in existence since November 1966 with a few minor exceptions. The Department of Insurance, which was then in a transition period, accepted the filing without any question and without requirement of any justification thereof. To the best of our knowledge the Department has no intention, at

this time, of requiring us to file any justification of the rates, however, the work which we are currently doing is in anticipation of such a requirement in the future.

I am looking forward to meeting with you on the thirtieth. Please keep me advised as to the time of your intended arrival in Phoenix.

Very truly yours,

John B. Wilkie, President

JBW:sjh

cc: Mr. E. Gordon Smith and Mr. James C. Wickline

**[RESPONDENTS TRIAL EXHIBIT  
RX 63-63A]**

**TITLE INSURANCE RATING BUREAU OF  
ARIZONA, INC.**

November 9, 1977

The Honorable J. N. Trimble, Director  
Department of Insurance  
State of Arizona  
1601 West Jefferson  
Phoenix, Arizona 85007

Dear Mr. Trimble

Enclosed herewith is the Schedule of Escrow Rates, Manual of Classification and Rules and Plans relating thereto which comprise the filing of the Title Insurance Rating Bureau of Arizona, Inc., made pursuant to Title 20, Chapter 2, Article 4, A. R. S. § 20-341, et seq. which is proposed to be effective on November 29, 1977. This initial filing is based upon the income and expense statements and the data already collected in Arizona and previously presented to the Department of Insurance. This filing is designed to meet the mandates of A. R. S. § 20-375 which include the maintenance of stability in the title insurance industry in the state of Arizona.

The present filing, based on historical rates, continues the implicit cross-subsidization in those rates which results in lower charges to those customers who purchase low and moderate priced real estate. This initial filing of these rates also preserves, so as not to affect statistical and income studies to be prepared, general income and loss positions in the industry so that any variation in those positions is solely a product of economic and business conditions. In effect, the present filing seeks to maintain the current economic position of the industry in accordance with the statutory mandates of A. R. S. § 20-375, until more complete studies can be concluded.

The Title Insurance Rating Bureau of Arizona, Inc. has employed Arthur D. Little, Inc. to design and implement such statistical plans and studies to support subsequent filings. A copy of the letter dated October 26, 1977 from Dr. Irving H. Plotkin of Arthur D. Little, Inc. is enclosed for your records.

Very truly yours

**TITLE INSURANCE RATING BUREAU OF  
ARIZONA, INC.**

By: /s/ Owen L. Wagoner  
President

**ATTEST:**

/s/ [Illegible]  
Secretary

**ACCEPTED AND APPROVED:**

AMERICAN TITLE INSURANCE  
COMPANY

By /s/ [Illegible]

ARIZONA TITLE INSURANCE AND  
TRUST COMPANY

By /s/ [Illegible]

CHICAGO TITLE INSURANCE  
COMPANY

By /s/ [Illegible]

COMMONWEALTH LAND TITLE  
INSURANCE COMPANY

By /s/ [Illegible]

LAWYERS TITLE INSURANCE  
CORPORATION

By /s/ John B. Wilkie

PIONEER NATIONAL TITLE  
INSURANCE COMPANY

By /s/ [Illegible]

ST. PAUL TITLE INSURANCE  
CORPORATION

By /s/ [Illegible]

TITLE INSURANCE COMPANY OF  
MINNESOTA

By /s/ [Illegible]

TRANSAMERICA TITLE INSURANCE  
COMPANY

By /s/ [Illegible]

USLIFE TITLE INSURANCE  
COMPANY OF DALLAS

By /s/ [Illegible]



**[RESPONDENT'S TRIAL EXHIBIT  
RX 72]**

**STATE OF ARIZONA  
DEPARTMENT OF INSURANCE**

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**IN THE MATTER OF  
TITLE INSURANCE RATING BUREAU OF ARIZONA**

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**NOTICE OF HEARING**

The Director of Insurance of the State of Arizona requests your presence at a joint conference of representatives of the Department of Insurance, Title Insurance Companies doing business in Arizona, Agents of Title Insurance Companies doing business in Arizona and the Title Insurance Rating Bureau of Arizona to be held on May 12, 1971 at 9:30 A.M. o'clock, at the First Federal Building Auditorium, 3003 North Central Avenue, Phoenix, Arizona 85012.

Please be prepared to discuss in detail:

- (a) The basis upon which rates and fees currently charged the public by Title Insurance Companies are fixed; and
- (b) The rating material currently on file with the Department of Insurance. Applicable Law is Arizona Revised Statutes Sections 20-375, 20-376 and 20-377.

Please be prepared to discuss also the method of determining "risk premium" as defined in Arizona Revised Statutes Section 20-1562.4 both for rate making purposes and for calculation of premium taxes and/or re-

taliatory amounts under Arizona Revised Statute Section 20-1566 C.

Please be prepared further to discuss the reporting of premium receipts by Title Insurance Companies in the annual statement (Schedule T) and premium tax return filed with the Department of Insurance.

/s/ Millard Humphrey  
MILLARD HUMPHREY  
Director of Insurance

[RESPONDENT'S TRIAL EXHIBIT  
RX 93-93 B]

[SEAL]

STATE OF ARIZONA  
DEPARTMENT OF INSURANCE  
1601 West Jefferson  
Phoenix, Arizona 85007

November 3, 1980

Title Insurance Rating Bureau of Arizona, Inc.  
P. O. Box 16020  
Phoenix, Arizona 85011

Attention: K. D. Mattison, President

Re: Examination by the Arizona Department of Insurance

Dear Mr. Mattison:

This letter is to inform you that the Arizona Department of Insurance will be conducting an examination of the Title Insurance Rating Bureau of Arizona, Inc. (TIRBA). The scope of the examination will include:

- 1) An examination of the rate-making procedures and methodology used by TIRBA with respect to the development of title insurance and escrow rates for use in Arizona;
- 2) A determination as to whether the title insurance and escrow rates as filed by TIRBA are reasonable and not excessive, inadequate or unfairly discriminatory;
- 3) An analysis of the methodology used for measuring the profitability of title insurers and their agencies, including an analysis of the Arthur D. Little statistical plan which has been filed on behalf of TIRBA;

- 4) An evaluation of the extent to which there is competition among title insurers doing business in Arizona; and
- 5) The identification of areas in which the rate-making methodology, including any statistical plan, together with the level of competitive activity among insurers might be improved.

This examination is being conducted pursuant to Arizona Revised Statutes, Sections 20-142.C and 20-370. Pursuant to § 20-370, "The director shall, at least once in every five years, make or cause to be made an examination of each rating organization licensed in this state". Additionally, "the reasonable costs of such examination shall be paid by the rating organization . . . examined on presentation to it of a detailed account of the costs". *i.d.* Because of the extremely technical nature of this examination, including the obvious need for substantial actuarial and economic expertise in this area, I have designated the firm of Peat, Marwick, Mitchell & Company as the examiner for purposes of this task. I have also concluded that the following fees for this examination are reasonable and subject to being paid by the rating organization:

<i>Person</i>	<i>Rate Per Hour</i>
James A. Faber, F.C.A.S.	\$140
Allan M. Kaufman, F.C.A.S.	\$110
Deborah A. Ford, Ph.D.	\$71
Consultants	\$45-90

It is estimated that the examination cost will be approximately \$60,000-\$70,000. Peat, Marwick, Mitchell & Company will also be entitled to reimbursement for out-of-pocket expenses incurred for travel, subsistence, record reproduction and other like expenses. It is estimated that such expenses will approximate 25% of the estimated fees.

Peat, Marwick, Mitchell & Company will submit progress statements to the Department for payment. Payments will be made directly to Peat, Marwick, Mitchell & Company from the Arizona Insurance Examiners' Revolving Fund which will, in turn, send a statement to TIRBA for the amount paid by the Fund as examination costs. TIRBA will be expected to promptly pay such amount to the Fund upon receipt of the statement of examination costs.

Let me also add that I believe this examination is a necessary undertaking on behalf of the Department. As you may be aware, the Department has never, to the best of my knowledge, conducted an examination of the title insurance rating organization, notwithstanding the fact that ARS § 20-370 requires such an examination at least once every five years. Additionally, the Department has not, as yet, approved the statistical plan prepared and filed on behalf of TIRBA by Arthur D. Little. Hopefully, this examination will provide the Department with the necessary evaluation of this statistical plan so that the plan can be approved or modified as our needs require. I would like you to know that I seriously considered your recommendation of the Coopers & Lybrand firm for purposes of undertaking this examination. However, in my judgment, Peat, Marwick, Mitchell & Company has the necessary expertise to promptly and efficiently carry out the examination responsibility along the lines outlined herein. Regardless, I did appreciate your taking the time to recommend the Coopers & Lybrand firm for this examination.

Because I believe that this examination is of critical importance in permitting the Department to carry out its statutory rate regulatory responsibility over title insurers, I am extremely interested in completing this examination in as short a time as possible under the circumstances. Therefore, it is expected that the examination will commence on November 15, 1980, and the projected

completion date should be sometime in February of 1981. Let me thank you for your anticipated cooperation in this matter. If you have any questions concerning your responsibilities or the procedures involved in this examination, please feel free to contact me.

Sincerely,

/s/ J. Michael Low  
J. MICHAEL LOW  
Director of Insurance

JML:ph

cc: Emil Barberich  
Chief Deputy Director of Insurance  
Donald O'Dean, Chief Examiner  
Arizona Department of Insurance  
Allan M. Kaufman, Manager  
Peat, Marwick, Mitchell & Company



[RESPONDENT'S TRIAL EXHIBIT  
RX 104]

[SEAL]

STATE OF CONNECTICUT  
INSURANCE DEPARTMENT  
State Office Building  
Hartford, Connecticut 06115

April 26, 1966

Connecticut Board of Title Underwriters  
Suite 1900  
161 William Street  
New York, New York 10038

Attention: Mr. Thomas Pearson, President

Dear Mr. Pearson:

Re: Title Insurance Rate Filing

In connection with the subject in caption could you visit us on May 3 or May 4 to discuss the filing? We feel that the filing should include insurance rates only and not the fees for the cost of examination of title. We need justification for such rates as well as the breakdown of the premium dollar. How will statistics be kept for this line of insurance? Will reserves be at least equal to those required under the New York law? What states have approved similar filings and what rates became effective?

In connection with the September 2, 1965 letter from Mr. Calvocoressi we believe the submission should have been made under Section 38-190 of the General Statutes rather than 38-119.

Please send us an extra copy of the Rate Manual of Connecticut Board of Title Underwriters and let us know if either May 3 or 4 is convenient for a conference. Commissioner Cotter is available either day.

Very truly yours,  
WILLIAM R. COTTER,  
Insurance Commissioner

/s/ G. R. Livingston,  
By: G. R. LIVINGSTON,  
Casualty Actuary

GRL:ct

[RESPONDENTS TRIAL EXHIBIT  
RX 105-105 A]

CONNECTICUT BOARD OF TITLE UNDERWRITERS  
Suite 1900  
161 William Street  
New York, N.Y. 10038

April 27, 1966

Re: Urgent—Immediate Return Requested

*To All Members*

In accordance with the Connecticut Insurance Department's letter of April 26 (copy attached) Mr. Pearson, President of the Board will meet with the Connecticut Commissioner and the Connecticut Casualty Actuary on May 4th and at that time will furnish the necessary information in support of the Board's Rate Filing.

In order to prepare the necessary data and information for said filing, the Special Committee on Rate Filing will meet on Monday, May 2, 1966 to review and compile the data which I can obtain *from each member company*. Due to the shortness of the time between now and Monday, I would deeply appreciate your telephoning direct to me (212-W04-3553) as promptly as possible the information requested below and following it up with a confirmatory written letter to me in time to reach me by Monday:

1. Total amount of insurance written by your company in Connecticut for 1963, 1964 and 1965.
2. Total number of policies issued by your company in Connecticut for 1963, 1964 and 1965.
3. Total amount of losses suffered by your company in Connecticut for 1963, 1964 and 1965.
4. The number of policies concerned with said losses for said period in Connecticut.
5. If possible, the kind of losses.

Appreciating your prompt and immediate attention to the foregoing request.

Very truly yours,

Edward T. Brown  
Secretary

ETB:mt  
Enc.

116

RX 105 A

May 3, 1966

Connecticut State Insurance Dept.  
State Office Building  
Hartford, Connecticut

Attention: Mr. Brian & Mr. Livingston,  
Casualty Actuaries

Dear Sirs:

This is to confirm my telephone conference of this date advising that it will be impossible for the Board officers to meet with you tomorrow. The Committee is preparing the data requested by you and it is expected that it will be approved by the Board on May 24th for submission to your department.

In the meantime, I will be in touch with you to set another date for our conference.

Appreciating your cooperation.

Very truly yours,

\_\_\_\_\_  
Secretary

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[RESPONDENT'S TRIAL EXHIBIT  
RX 106]

CONNECTICUT BOARD OF TITLE UNDERWRITERS  
Suite 1900  
161 William Street  
New York, N.Y.

June 9, 1966

Hon. William R. Cotter  
Insurance Commissioner  
Insurance Department of the State of Connecticut  
State Office Building  
Hartford, Connecticut 06115

Attention: Mr. Robert Brian,  
Casualty Actuarial Division

Dear Sir:

This is to advise that at a meeting this morning of the members of the Connecticut Board of Title Underwriters, the membership voted to withdraw the present rate and forms filing.

Accordingly, I hereby withdraw the rate and forms filing of the Connecticut Board of Title Underwriters as presently on file with the Connecticut Insurance Department. Said withdrawal is to be effective immediately.

Very truly yours,

/s/ Edward T. Brown  
Secretary



[RESPONDENT'S TRIAL EXHIBIT  
RX 107-107 A]

CONNECTICUT BOARD OF TITLE UNDERWRITERS

June 10, 1966

Hon. William R. Cotter  
Insurance Commissioner  
Insurance Department of  
State of Connecticut  
State Office Building  
Hartford, Connecticut

Attention: Mr. Robert Brian  
Casualty Actuarial Division

Dear Sir:

On behalf of the members and subscribers of the Connecticut Board of Title Underwriters I enclose herewith for filing the following documents:

1. Rate Manual of Connecticut Board of Title Underwriters dated June 10, 1966.
2. Policy Forms—"American Land Title Association—Owner's Policy Standard Form B-1962" and American Land Title Association Standard Loan Policy—Revised Coverage 1962"—which have been adopted for use in the State of Connecticut by the Connecticut Board of Title Underwriters.
3. Memorandum in Explanation and Support of Rate Manual of Connecticut Board of Title Underwriters dated June 10, 1966.

In order to facilitate the administration of the filing, the Board has adopted the following rule of application:

"This rate manual and the policy forms filed for use in connection therewith, shall be applicable to all

applications for title insurance and guaranteed searches made in the State of Connecticut on and after August 15, 1966".

It is respectfully requested that the enclosed Rate Manual and Policy Forms be approved to become effective August 15, 1966.

Respectfully submitted,

---

Secretary

ETB:mt

cc: Mr. Gilbert R. Livingston  
Casualty Actuary

**[RESPONDENT'S TRIAL EXHIBIT  
RX 108]**

[SEAL]

STATE OF CONNECTICUT  
INSURANCE DEPARTMENT  
State Office Building  
Hartford, Connecticut 06115

June 29, 1966

Connecticut Board of Title Underwriters  
Suite 1900  
161 William Street  
New York, New York 10038

Attention: Mr. Edward T. Brown,  
Secretary-Treasurer

Dear Mr. Brown:

Re: Rate Manual

Under the Approved Attorney Plan you state that this plan is available only through an approved attorney who is a licensed Attorney-at-Law in the State of Connecticut. In talking this filing over with our Attorney General he asked us to obtain a definition from you of "Approved Attorney". We would appreciate if if you would send us such a definition in duplicate at your earliest convenience.

Very truly yours,

WILLIAM R. COTTER,  
Insurance Commissioner

/s/ G. R. Livingston  
By: G. R. Livingston,  
Casualty Actuary

GRL:ct

**[RESPONDENT'S TRIAL EXHIBIT  
RX 109-109 B]**

CONNECTICUT BOARD OF  
TITLE UNDERWRITERS  
Suite 1900  
161 William Street  
New York, N.Y. 10038

212 WO 4-8883

June 30, 1966

Hon. William R. Cotter  
Commissioner of Insurance  
State of Connecticut  
State Office Building  
Hartford, Connecticut

Attention: Mr. Livingston

Gentlemen:

We are informed by Mr. Livingston that the Attorney General wishes to have further information on the Approved Attorney Plan which is included in our recent filing of General Rules, Rates and Definitions.

For many years, title insurance companies have used the Approved Attorney Plan, in most of the fifty states, as an accepted means of doing business. Under such a plan, the insurer is furnished with an opinion (certification) of title by a law firm, or an attorney admitted to practice law in the state where the property is located. The insurer will issue a commitment to insure, or a title insurance policy, based upon the facts contained in the attorney's opinion of title. The attorney's opinion may be set up in letter form, but frequently it is rendered on a form prepared by the insurer and furnished to the attorney for this purpose.

Since there are elements of risk and responsibility involved in insuring titles which are searched and examined by approved attorneys, title insurance companies, as a matter of good business judgment, must be selective in their choice and use of real estate counsel. For this reason, title insurance companies have specific procedures for approving law firms, or attorneys, with whom they expect to do business.

The appointment of Approved Attorneys (sometimes also referred to as approved examining counsel) requires a careful evaluation of their ability to properly search, examine and certify title to real property. So that liability will be assumed by the insurer based only upon satisfactory and sufficient title evidence, certain criteria and procedures are followed by most insurers. A sample of one member company's procedure is as follows:

1. The law firm, or attorney applicant, will complete company form No. 70A (Application for Approved Attorney List) attached. The application form contains considerable biographical data on the applicant, as well as information on the applicant's experience in the field of real estate law.

2. Frequently, checks are made with institutional lenders and other attorneys in the applicant's area, as to his general standing in the business community.

3. Professional directories are sometimes consulted for additional data.

4. A personal interview in the applicant's office is usually made by a company employee, or agent.

If the insurer is satisfied with the applicant's qualifications, an appointment letter is forwarded (see sample form attached). Along with the appointment letter, the company usually sends a list of instructions and procedures to be followed by the approved attorney (copy attached). Upon acceptance of the appointment, the insurer will furnish additional forms to be used by the approved attorney in certifying titles in connection with

the insurer's applications for owners, leasehold and for mortgage insurance.

The Approved Attorney Plan is open to all qualified Connecticut attorneys and, in fact, the member companies of the Connecticut Board of Title Underwriters would welcome applications from qualified Connecticut attorneys to become approved examining counsel in Connecticut in accordance with the Approved Attorney Plan.

In accordance with your request a copy of this letter and the forms mentioned therein are enclosed for the convenience of the Attorney General.

Very truly yours,

/s/ Edward T. Brown  
Secretary



[RESPONDENT'S TRIAL EXHIBIT  
RX 110]

[SEAL]

STATE OF CONNECTICUT  
INSURANCE DEPARTMENT  
State Office Building  
Hartford, Connecticut 06115

July 6, 1966

Connecticut Board of Title Underwriters  
Suite 1900  
161 William Street  
New York, New York 10038

Attention: Mr. Edward T. Brown,  
Secretary-Treasurer

Dear Mr. Brown:

Re: Title Insurance

This will acknowledge receipt of your letters of June 9, June 10, June 21 and June 30, 1966. The filing as submitted on June 10 and amended June 21 is approved for use in Connecticut effective August 15, 1966. The two policy forms attached to the June 10 letter have been filed. The approval of the filing is made without prejudice as to any questions that may arise at a later date in connection with the state premium tax.

Very truly yours,

/s/ William R. Cotter  
Commissioner

WRC:ct

[RESPONDENT'S TRIAL EXHIBIT  
RX 114-114 A]

CABELL, KENNEDY & FRENCH  
5 Landmark Square  
Suite 200  
Stamford, CT 06901

Telephone (203) 964-0180

October 12, 1983

Connecticut Board of Title Underwriters  
Principal Representatives  
(Messrs. Lasseter, Bannon, Ciarleglio, DeToro,  
Holden, Keegan, Norton, Pearson, Sheehy,  
Statton and Steen)

Re: *CBTU Rating Plan*

Gentlemen:

On Friday, October 7, 1983, Dave Lasseter, Burt Steen and I met with Waldo R. DiSanto, Director, Property & Casualty Division, Connecticut Insurance Department. Mr. DiSanto said that he had not seen the new Rate Manual filed by CBTU letter dated September 30, 1983. However, after a lengthy discussion in which the provisions of the new manual, including the changes from the former manual, were explained to him, Mr. DiSanto said that he has no problem with the filing.

Accordingly, it appears that the new Rate Manual can be put into effect on October 15, 1983 as scheduled.

During the course of our discussion, Mr. DiSanto said that the Insurance Department considers the amount of commissions being paid to certain title insurance agents to be excessive. He indicated that the Department may seek to limit the amount of commissions that can be paid to agents. At first he suggested that this might be done by limiting the commission expense factor in the

overall rates. However, he subsequently agreed that this would not be effective. As an alternative, he proposed to consider a regulation that would proscribe payment of commissions over a certain percentage of the applicable rate charge. He indicated that the Department might schedule a hearing and call industry witnesses prior to proceeding with such a regulation.

Mr. DiSanto said that the meeting was helpful to his understanding of the CBTU rating plan and expressed his appreciation for our visit to his office.

Very truly yours,

/s/ T. Richard Kennedy  
T. RICHARD KENNEDY

TRK/dbf

cc: (Messrs. Anderson, Bennison, Byrne,  
Harvey, McMackin, Wilson and  
Winkler)

[RESPONDENT'S TRIAL EXHIBIT  
RX 115]

CONNECTICUT BOARD OF  
TITLE UNDERWRITERS  
5 Landmark Square, Suite 200  
Stamford, CT 06901  
(203) 964-0180

October 12, 1983

Waldo R. DiSanto, Director  
Property & Casualty Division  
State of Connecticut  
Insurance Department  
165 Capitol Avenue  
Hartford, Connecticut 06106

Dear Mr. DiSanto:

Thank you for taking time from your busy schedule to meet with us last Friday. We very much appreciate your interest in our efforts to provide a fair and equitable rating plan for the business of title insurance in Connecticut.

On the basis of our discussion, we understand that your Department has no objection to the implementation of the new CBTU Rate Manual filed with our letter of September 30, 1983. Accordingly, our member companies have been advised that the new Manual can be put into effect on October 15, 1983 as scheduled.

Please do not hesitate to call us at any time with respect to any questions that you may have.

Very truly yours,

H. DAVID LASSETER

HDL/dbf

**[RESPONDENT'S TRIAL EXHIBIT  
RX 116]**

CONNECTICUT BOARD OF  
TITLE UNDERWRITERS  
5 Landmark Square, Suite 200  
Stamford, Ct. 06901  
(203) 964-0180

September 30, 1983

The Honorable	[Stamp:
Peter W. Gillies	Recorded Effective 10/15/83
Commissioner of Insurance	Connecticut Insurance
State of Connecticut	Department
Insurance Department	By: [Illegible]
State Office Building	Examiner [Illegible]
Hartford, Connecticut 06115	Division]

Re: Connecticut Board of Title Underwriters Rate Manual

Dear Sir:

Enclosed is a copy of a new CBTU Rate Manual which is proposed to become effective October 15, 1983. Enclosed also is a memorandum describing the principal changes from the present Rate Manual.

As indicated by the memorandum, the new Rate Manual is the result of a two-year study by the CBTU. It is intended to clarify certain rating provisions and to delete certain provisions no longer considered necessary or desirable. Except for minor adjustments which are noted in the memorandum, the new Rate Manual does not change the rate levels currently filed by the CBTU with your Department.

We appreciate your attention to this matter and would be pleased to answer any questions that you may have.

Very truly yours,

/s/ H. David Lasseter pfe  
H. DAVID LASSETER  
President

HDL:aa  
Enclosures

**[RESPONDENT'S TRIAL EXHIBIT  
RX 295]**

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

October 28, 1968

Richard P. Buellesbach, Esq.  
Whyte, Hirschboeck, Minahan, Harding  
& Harland  
2100 Marine Plaza  
Milwaukee, Wisconsin 53202

Dear Mr. Buellesbach:

Re: Title Insurance Rating Bureau

We have reviewed the revised Articles of Association which you forwarded to us with your letter of October 23, 1968.

The provisions in these revised articles appear to comply fully with all current requirements of law, and otherwise appear to be proper in all material respects. From the standpoint of approval by this office, the adoption of the revised articles referred to above by the Title Insurance Rating Bureau would be acceptable.

Very truly yours,

/s/ G. L. Miller  
G. L. MILLER  
Assistant Deputy Commissioner

GLM:sf



[RESPONDENT'S TRIAL EXHIBIT  
RX 302]

## MEMORANDUM

CHICAGO TITLE INSURANCE COMPANY  
TITLE GUARANTY COMPANY OF WISCONSIN DIVISION  
734 North Fourth Street  
Milwaukee  
Broadway 1-5113

August 17, 1970

To: Officers, Principal Delegates and Alternate Delegates of Wisconsin Title Insurance Rate Service Organization

From: Leonard C. Donohoe, Jr.

Subject: Proposed rate filing. Progress report.

- Mr. Kennedy indicated that the Department would carefully review our filing when formally made and either accept it or informally convey their observations and comments back to us for further consideration.
- Mr. Kennedy suggested that we develop a statistical plan or experience table to justify future rate filings. I would welcome comments or suggestions from any of you on a possible approach to this.

It has been noted that the proposed filing does not make provision for junior mortgage policies nor for insurance of additional advances under open end mortgages. I will ask Bob McMackin to give me his recommendation for these additions.

Capitol Land Title Insurance, Inc. is no longer in the direct writing title insurance business and has resigned from the Organization.

Again, as soon as I receive forms for filing from all members, together with authorizations to the Organiza-

tion from the members to file forms and rates in their behalf and as soon as I have Bob's suggestion on junior mortgage policies and additional advances, I will proceed to make the necessary filings. May I hear from all principal delegates as soon as possible.

LCD:mj  
Encl.

**[RESPONDENT'S TRIAL EXHIBIT  
RX 303]**

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

April 27, 1971

Wisconsin Title Insurance Rate  
Service Organization  
734 North Fourth Street  
Milwaukee, Wisconsin 53203

Attention: Mr. Leonard C. Donohoe, Jr., President

Gentlemen:

Title Insurance Rates  
Your letter of April 14

The rate filings effective June 1, 1971, are acceptable.

In future filings, rate filings should be submitted within 30 days after they become effective, to comply with the current rate law.

As respects the rate filing, please explain why the search and examination charges are filed to be part of the cost of insurance only in the southeastern counties of Wisconsin consisting of Kenosha, Milwaukee, Ozaukee, Racine, Walworth, Washington, and Waukesha. It is our understanding that the policy forms and endorsements are uniformly applicable to all counties and, if so, why should not the appropriate search and examination charges be established for all counties—adjusted, if necessary, to reflect the difference in expense factor in the several counties? We would appreciate an explanation for our records.

Very truly yours,

/s/ J. Ed. Kennedy  
J. ED. KENNEDY  
Actuary

JEK:ecm  
Enc. duplicate submission

[RESPONDENT'S TRIAL EXHIBIT  
RX 305]

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

June 5, 1973

Mr. Robert J. Mithcell, Vice President  
Commonwealth Land Title Insurance Company  
135 West Wells Street  
Milwaukee, Wisconsin 53203

Dear Mr. Mitchell:

Your letter of June 4, 1973

Enclosed you will find a current copy of the document entitled Instructions for Licensing Insurance Agents. Since I am the person charged with handling title insurance filings in Wisconsin, I suggest that you name two dates in the next month which you could be in Madison. Upon receipt of this information, I will then tell you which of these dates would be better for me. If there are other members of the department who you would like to have at this meeting to discuss the overall relationship of the title industry and the commissioners office, please let me know.

Sincerely,

/s/ Norman J. Wirtz  
NORMAN J. WIRTZ  
Insurance Rate and Form Analyst

NJW:iep  
Enc.

[RESPONDENT'S TRIAL EXHIBIT  
RX 307]

July 12, 1973

Mr. Norman J. Wirtz  
Insurance Rate and Form Analyst  
Office of the Commissioner of Insurance  
State of Wisconsin  
201 East Washington Street  
Madison, Wisconsin 53702

Dear Sir:

Thank you for your quick reply to my letter on June 4, 1973. I also wish to thank you for the information forwarded at the same time.

In response to your suggestion that I name two dates in July when I could be in Madison, my preference would be either Wednesday, July 11 or Thursday, July 12. However, the 18th or the 19th and the 25th and the 26th are at this time also open.

Perhaps the best way to determine what other people, if any, should be in attendance can be determined by somebody by what some of the things that I would like to cover.

First, I would like to review the current filings. I would also like to go over procedures for the filing of deviations.

Another point is licensing requirements. Thirdly, the general areas covered by communications between the Office of the Commissioner and the Rate Service Organization. I am interested in your interpretation of our function, and also what you expect of us. I would like to find out how regularly, if at all, you want reports from us concerning various matters.

Very truly yours,

Robert J. Mitchell  
Vice President

RJM:MBK



[RESPONDENTS TRIAL EXHIBIT  
RX 308]

WISCONSIN TITLE INSURANCE  
RATE SERVICE ORGANIZATION

2100 Marine Plaza  
Milwaukee, Wisconsin 53202

January 18, 1974

Officers, Principal Delegates and Alternate Delegates  
of Wisconsin Title Insurance Rating Bureau

The time has come to call a meeting of the Wisconsin  
Title Insurance Rate Service Organization.

The Insurance Commissioner of the State of Wisconsin  
has asked me how we justify our rates. I think this  
should be the main subject for our meeting, and because  
this may require that several of our delegates get further  
advise from their home offices, the meeting date has been  
left open pending your advice. My preference would be  
the week commencing March 25, or one of the first two  
weeks in April. I would appreciate a reply as soon as  
possible so that the proper arrangements can be made.

Consideration should also be given to methods to carry  
out some of the purposes in our articles of incorporation  
which have been neglected at our previous meetings.  
These would include:

Paragraph 2:

To acquire, publish and distribute information pertaining  
to the business of title insurance and of interest generally  
to the members of the Organization and to the public at  
large.

Paragraph 3:

To approve policy forms and other documents pertaining  
to title insurance and to establish on an equitable and  
impartial basis underwriting rules and classifications of

risks and rates, all in accordance with the insurance laws  
of the State of Wisconsin.

Paragraph 6:

To further the interests of the business of title insurance  
generally and to do such other and related acts and things,  
including the making and performing of any contracts  
which are necessary or appropriate to accomplish the pur-  
poses herein set forth.

Your response to this is also solicited.

RJM:MBK

[RESPONDENT'S TRIAL EXHIBIT  
RX 311]

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

April 30, 1974

Mr. Robert J. Mitchell, Vice President  
Commonwealth Land Title Insurance Company  
135 East Wells Street  
Milwaukee, Wisconsin 53203

Dear Mr. Mitchell:

Thank you for your letter of April 23 concerning your recent title insurance meeting. Although the Wisconsin Title Insurance Rate Service Organization has not resolved many of the questions of concern to this office, it appears that your organization is now making some progress in these areas. Please keep us advised as to future developments.

As to the penultimate paragraph of your letter, I have referred a copy of your letter to our examining division. They will be able to furnish you with financial statistics as reported to your office for 1973 for all title insurance companies. When they have had an opportunity to compile the data requested, they will forward it to you directly.

Very truly yours,

/s/ Louis N. Hannes  
LOUIS N. HANNES, Chief  
Property-Casualty Rates Division

LNH:iep

[RESPONDENT'S TRIAL EXHIBIT  
RX 316]

[SEAL]

OFFICE OF THE COMMISSIONER OF INSURANCE  
STATE OF WISCONSIN

July 18, 1974

Mr. Robert J. Mitchell, President  
Wisconsin Title Insurance Rate Service Organization  
c/o Commonwealth Land Title Insurance Company  
135 West Wells Street  
Milwaukee, Wisconsin 53203

Dear Mr. Mitchell:

Title Insurance—Rate Justification

Please consider this letter as a formal request from this office for your organization to compile the statistical information discussed in our July 12 meeting. We also request that all member companies of your rate service organization participate in the compilation of the requested statistical data.

Very truly yours,

/s/ Louis N. Hannes  
LOUIS N. HANNES, Chief  
Property-Casualty Rates Division

LNH:iep

**[RESPONDENT'S TRIAL EXHIBIT  
RX 317-317 A]**

**WISCONSIN TITLE INSURANCE  
RATE SERVICE ORGANIZATION  
2100 Marine Plaza  
Milwaukee, Wisconsin 53202**

**MINUTES OF THE MEETING OF  
September 11, 1974**

The meeting of the Wisconsin Title Insurance Rate Service Organization was held on September 11, 1974 at the Pioneer Inn, Oshkosh, Wisconsin. The following representatives were present:

American Title Ins. Co.	Alan Dolenshek
Chicago Title Ins. Co.	Ronald L. Otto George Hursig, Jr. Leonard C. Donohoe
Lawyers Title Ins. Co.	Richard F. Cimpl Richard Stopczynski James Reynolds Gerald Klein
Pioneer National Title Ins. Co.	Don Walters Philip M. Larkin Richard Tyson
St. Paul Title Ins. Co.	Melvin A. Bois Nic Hoyer
Title Ins. Co. of Minn.	Michael Pollack
The following company was absent:	Stewart—Title Guaranty

The meeting was called to order by President Mitchell at 1:15 P.M. Each member having previously read the minutes from the previous meeting, a motion was made and carried to dispense with reading said minutes.

George Hursig, Jr. was called on to bring the organization to date concerning the rate justification committee's work. First he reported that Louis N. Hannes of the Commissioner's office had approved the form that his subcommittee had recommended. He had but one reservation, and that was the separating of the risk from the search and examination. However, he said for now he was satisfied.

The rating organization, at the Commissioner's request, is to supply five years history with April 15, 1975 being the target date for the first report.

The next step to be taken was to find a party that could take the submissions by the individual companies and compile them into one report for the Commissioner. The President was requested to approach our counsel and ask if someone in his firm could have this done for us. A reply was to be made to George Hursig, Jr.

A motion was then made and seconded to accept the rate justification subcommittee's report form. There was some opposition to this, and the membership was polled. The results are as follows:

American Title Ins. Co.	.....abstained
Chicago Title Ins. Co.	.....for acceptance
Commonwealth Land Title Ins. Co.	...for acceptance
Lawyers Title Ins. Co.	.....for acceptance
Pioneer Nat'l Title Ins. Co.	.....for acceptance
St. Paul Title Ins. Co.	.....for acceptance
Title Ins. Co. of Minn.	.....abstained.
Motion carried.	

Discussion was then held on the hiring of Dr. Irving Plotkin of the Arthur D. Little, Inc. to discuss with Commissioner DuRose with the hope of changing his opinions relative to his position that net profit on gross revenue



was a proper basis for determination for rate justification. The following motion was then introduced and seconded:

"Resolved, That Wisconsin Title Insurance Rate Service Organization retain Dr. Irving H. Plotkin, of Arthur D. Little, Inc. to counsel with the Wisconsin Commissioner of Insurance on a reasonable rate of return on revenue for the title insurance industry; That such retention be within budgetary limits of \$5,000.00 pending further authorization."

Motion approved by unanimous vote.

George Hursig, Jr. volunteered to approach Dr. Plotkin on behalf of the organization.

[RESPONDENT'S TRIAL EXHIBIT  
RX 323-323 A]

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

March 3, 1975

Senator Ernest Keppler  
Room 316 South  
State Capitol  
Madison, Wisconsin 53702

Dear Senator Keppler:

The public hearing referred to in Joseph G. Altschaeff's letter to you was to consider adoption of Administrative Rules Ins 3.32 Title Insurance—Prohibited Practices and Ins 3.33 Title Insurance Rates. I am sending you a copy of pages from the January, 1975 Wisconsin Administrative Register which include the Notice of Hearing and the text of the proposed rules. I assume that Mr. Altschaeff already has copies of these proposals.

The hearings were well attended by abstractors, attorneys and representatives of title insurers. I note from the hearing appearance list that Mr. Altschaeff was able to attend the hearing.

Separate records were made of the hearing concerning the two proposed rules. I am enclosing a copy of a statement concerning proposed Ins 3.32 which was made a part of the record of the hearing and which summarizes the purpose of the rule. Those in attendance seemed to be in agreement with the general purpose of the proposal, but had several suggestions and criticisms of the particular provisions. The record of the hearing was left open for 20 days for submission of additional comments and suggestions.

The hearing on proposed Ins 3.33 Title Insurance Rates was for the purpose of instituting a delayed effective date

for title insurance rates, requiring the prior approval of such rates and specifying the supporting data which was to be included as part of a rate filing. Exhibits were introduced at the hearing which show that most of the title insurers doing business in Wisconsin are members of the Wisconsin Title Insurance Rate Service Organization and that substantially all of the title insurance in Wisconsin is written at the same premium rate. These exhibits appear to show that there is no price competition at the level of the consumer and that competition is not an effective regulator of rates such as contemplated in sections 625.11 and 625.21, Wis. Stats. In such cases a rule may be promulgated requiring prior approval of rates.

A representative of the Wisconsin Title Insurance Rate Service Organization at the hearing agreed to the instituting of prior approval for title insurance rates, but he, the representative of the Wisconsin Land Title Association and others, objected to the limitation on premium charges set out in subsections (6) and (7) of the proposed rule. The hearing was recessed until April 17, 1975 so that information could be furnished to establish levels of premium rates which meet the requirements of Chapter 625, Wisconsin Statutes. The Wisconsin Title Insurance Rate Service Organization and the Wisconsin Land Title Association have agreed to prepare data for this purpose, but I will welcome information from any source.

Very truly yours,

/s/ S. C. DuRose  
S. C. DuROSE  
Commissioner of Insurance

SCD:imk

Enc.

cc: Mr. Joseph G. Altschaeff  
Port Abstract & Title Co., Inc.  
125 West Grand Avenue  
Port Washington, Wisconsin 53074

[RESPONDENT'S TRIAL EXHIBIT  
RX 329-329 A]

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

October 27, 1975

Mr. Leonard C. Donohoe, Vice President and Manager  
Chairman—Subcommittee of Wisconsin Title  
Insurance Rate Service Organization  
c/o Wisconsin Division  
Chicago Title Insurance Company  
734 North Fourth Street  
Milwaukee, Wisconsin 53203

Dear Mr. Donohoe:

Thank you for the suggestions concerning Wisconsin Administrative Code section Ins 3.32 Title Insurance—Prohibited Practices presented with your letter of September 24, 1975 and earlier.

The suggestion in your September 24 letter that Ins 3.32 (3) (d) be changed to only include "customary" search and examination charges in the definition of title insurance rates was rejected because all search and examination charges, customary or not, should be a part of the title insurance rate. However, it is recognized that not all situations can be described or provided for specifically in a rate manual so that the prohibited practices part of the rule has been changed to permit an insurer to file material with this office which would include enough information so that the amount of all search and examination charges could be determined. Any excessive or inappropriate charges could be disapproved. This was accomplished by changing paragraphs (a) and (b) in subsection (4) so that they will read:

- (a) Charging an amount for a title insurance policy or commitment for a title insurance policy other than the amount developed by application of the appropriate title insurance rate developed from the rates and supplementary rate information on file with the commissioner for use by the title insurer.
- (b) Waiving, or offering to waive, all or any part of the applicable title insurance rate or premium developed by proper application of the appropriate title insurance rate developed from the rates and supplementary rate information on file with the commissioner.

A reference to the definition of supplementary rate information included in section 625.02 (1), Wis. Stats., was added to the definitions section of the rule as paragraph (e).

The reference to "rates and supplementary rate information" in the rule will be consistent with the reference in section 625.13, Wis. Stats., which requires the filing of rates. Supplementary rate information for title insurance is defined broadly enough to include schedules to include the unusual rating situation similar to the experience rating and schedule rating filings which have been developed for other lines to meet the requirements of section 625.02, Wis. Stats.

Commissioner Wilde plans to proceed with the adoption of this rule in order to have it effective as soon as possible.

Very truly yours,

/s/ M. E. Van Cleave  
M. E. VAN CLEAVE  
Assistant Deputy Commissioner

MEV:imk

[RESPONDENT'S TRIAL EXHIBIT  
RX 335]

STATE OF WISCONSIN  
CORRESPONDENCE/MEMORANDUM

Date: August 20, 1976  
To: Harold R. Wilde, Commissioner of Insurance  
From: Norman J. Wirtz, Insurance Rate and Form Analyst  
Subject: Title Insurance Study

File Ref: [Handwritten notes:  
"Many thanks  
H 8/22  
(Please Keep a file)"]

Some time ago, you requested comments on the study by Hofflander and Shulman on "The Distribution of Title Insurance in California—Analysis of a Potential Problem".

This study speaks to the growing problem in California of real estate brokers forming controlled underwritten title companies. The potential for conflict of interest in these arrangements are obvious. In the real estate settlement process, the producer controls or has the potential to control the placement of title insurance. Because the underwritten title company searches the title and actually issues the policy for its underwriting title insurer, the title insurer is at the mercy of the UTC on the other end of the transaction. The controlled UTC can choose the insurance company which will be its underwriter. A major factor in this decision is the amount that the controlled UTC will receive as compensation for the handling of the insurance transaction for this insurer. Competition among title insurers could drive up the price each title insurer is willing to pay the UTC for his busi-



ness. The broker then has power or leverage to deny competitors free access to the market.

In Wisconsin, the title insurance operation is conducted through company branch offices or title plans owned by title insurance agents. We know of no active real estate broker who also owns a title insurance plant. Generally, these plants in the Milwaukee area write for just one title company. This has historical reasons because many of these plants spun off from the company by means of purchase by agents over the years. In other areas, the agents do write for more than one title company but the volume of business is in the Milwaukee area. This leads me to conclude that the structure of the business is quite different than California.

In connection with this, I thought it would be useful to update the exhibit submitted by Dr. Plotkin at the title rate hearing over a year ago to include the results of 1975. This gives a rough measure of the industry rate of return on capital and on net worth. The title industry appears to be following the depressed earnings cycle of the property liability business fairly closely. It is suggested that we take another look at this when the 76 results are in to see if there has been any improvement in the earnings of this industry. It is interesting to note that the title industry in Wisconsin did out perform the industry on a countrywide basis by showing a [illegible] ratio of only 2.5% for Wisconsin vs. a [illegible] ratio of 5.4% countrywide.

**[RESPONDENTS TRIAL EXHIBIT  
RX 337]**

**WISCONSIN TITLE INSURANCE  
RATE SERVICE ORGANIZATION**  
2100 Marine Plaza  
Milwaukee, Wisconsin 53202

October 1, 1976

Officers, Principal Delegates and  
Alternate Delegates of Wisconsin  
Title Insurance Rating Service

On September 30, 1976 Lou Hannes of the Commissioner's office called and said that they had approved the statistical system and the income and expense plan conditionally, subject to changes they may want to make later. The only change they would like to see at this time is a reconciliation between the national data as called for in the income and expense plan and the statutory data supplied annually by the companies on the NAIC blank pertaining to non-admitted assets.

Mr. Hannes also informed me that an advisory committee to the commissioner has suggested a new list of definitions for the various lines of insurance in which title is defined as follows: "Title—to insure against loss by reason of defects in title to property." As of this date the definitions have not been approved by the commissioner.

By a letter of this date I am informing Nelson Lipshutz of Arthur D. Little of the commissioner's response. I am also requesting that further consideration of this matter be taken up with Dick Buellbach.

/s/ [Illegible]

[RESPONDENT'S TRIAL EXHIBIT  
RX 341]

[SEAL]

STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE

January 18, 1977

Wisconsin Title Insurance Rate Service Organization  
2100 Marine Plaza  
Milwaukee, WI 53202

Attention: Mr. Richard P. Buellbach, Secretary

Gentlemen:

This will acknowledge the filing of your Statistical System and your Income and Expense Plan, each dated August 25, 1976, and each prepared by Arthur D. Little, Inc.

We have reviewed this filing, which we understand was implemented on January 1, 1977, and find that it is acceptable subject to such future action as may be deemed necessary by this office. Our acceptance of this filing is also subject to your organization making every effort to obtain complete cooperation from title insurers and their agents. This cooperation is necessary if we are to get complete information and the statistical data outlined in your proposed filing.

It should also be noted that this office may at some point in the future adopt an administrative rule pertaining to a statistical plan for title insurance as well as an income and expense plan similar to that contained in your filing. However, for the present, we do not believe the

rule is necessary if the title insurance companies and agents voluntarily comply with the programs filed by your organization.

Very truly yours,

/s/ L.N. Hannes  
LOUIS N. HANNES, Director  
Property-Casualty Rates Bureau

LNH:iep

**[RESPONDENT'S TRIAL EXHIBIT  
RX 367]**

[SEAL]

**STATE OF WISCONSIN  
OFFICE OF THE COMMISSIONER OF INSURANCE**

April 8, 1981

Mr. Donald E. Grabski, President  
Wisconsin Title Insurance Rate Service Organization  
2100 Marine Plaza  
Milwaukee, WI 53202

Dear Mr. Grabski:

The recent rate revision filed by your organization is in the process of being reviewed. It appears to contain substantial rate increases and there may be a need to request further documentation regarding the rate change. Please advise this office which of the members of your organization have adopted the rate revision.

Sincerely,

/s/ John F. Keegan  
JOHN F. KEEGAN, Director  
Rates and Forms Bureau

JFK/gjh

April 10, 1981

Original letter delivered to  
Don Grabski today  
dh

April 13, 1981—copy  
mailed to Len Donohue.  
[Initialed]

**[RESPONDENT'S TRIAL EXHIBIT  
RX 369-369 A]**

**CHICAGO TITLE INSURANCE COMPANY  
734 North Fourth Street  
Milwaukee, Wisconsin 53203  
(414) 271-5113**

June 1, 1981

Mr. John F. Keegan  
Director  
Bureau of Rates and Forms  
Office of the Commissioner of Insurance  
201 East Washington Avenue  
Madison, Wisconsin 53703

Re: Wisconsin Title Insurance Rate  
Service Organization

Dear Mr. Keegan:

The following are submitted as agreed upon at our meeting on May 11, 1981:

1. 1976 Wisconsin Title Insurance Rate Service Organization Financial Reporting Plan
2. 1976 Wisconsin Title Insurance Rate Service Organization Statistical System
3. Letter of August 25, 1976 from Nelson R. Lipschutz, Consultant, Regulation and Economics, of Arthur D. Little, Inc. to Mr. Louis N. Hannes, Chief Property-Casualty Rate Division, submitting the foregoing plans.
4. Letter of January 18, 1977 from Mr. Hannes to Richard P. Buellesbach, Secretary, Wisconsin Title Insurance Rate Service Organization acknowledging the filing of the foregoing plans.



5. Letter of August 24, 1978 from C. Ray Winder to Harold R. Wilde, Jr., Commissioner of Insurance, submitting expanded versions of the 1978 plans.
6. 1978 Statistical Plan
7. 1978 Financial Reporting Plan
8. Letter of August 11, 1978 from Michael F. Koehn of Arthur D. Little, Inc. to Richard P. Buellbach, Secretary of WTIRSO commenting on the 1978 changes to the statistical and financial reporting plans.

I believe this is all of the data that I offered to furnish. Messrs. Hursig and Grabski will forward the further data submissions that we discussed.

Thank you for meeting with us. If I can provide any further information, please let me know.

Very truly yours,

LEONARD C. DONOHUE  
Vice President and Manager  
North Central Region

Enclosures

cc: Mr. Donald E. Grabski  
Mr. George E. Hursig  
Mr. Norman J. Wirtz, Insurance Rate &  
Forms Analyst  
Mr. Marvin E. Van Cleave,  
Insurance Administrator

[RESPONDENT'S TRIAL EXHIBIT  
RX 370-370 A, C-E, U, V]

ECONOMIC ANALYSIS OF THE  
WISCONSIN TITLE INSURANCE INDUSTRY  
1972-1980

*report to*

OFFICE OF THE COMMISSIONER OF INSURANCE  
STATE OF WISCONSIN  
AND  
WISCONSIN TITLE INSURANCE RATE  
SERVICE ORGANIZATION

JULY 1981

Arthur D. Little, Inc.

RX 370A

Arthur D. Little, Inc.  
Acorn Park  
Cambridge, MA 02140  
(617) 864-5770  
TELEX 921436

July 13, 1981

The Honorable Susan M. Mitchell  
Commissioner of Insurance  
Wisconsin Insurance Department  
123 W. Washington Avenue  
Madison, Wisconsin 53702

Dear Commissioner Mitchell:

Pursuant to our ongoing agreement with the Wisconsin Insurance Department and the Wisconsin Title Insurance Rate Service Organization, we are pleased to submit herewith the results of our analysis of the financial and statistical data on 1980 operations collected by the member companies of the Rate Service Organization. These data were collected through the regulatory data reporting system (the Wisconsin Title Insurance Rate Service Organization Financial and Statistical Reporting Plans) requested and approved by the Department.

In this report we incorporate our analysis of the 1980 financial and statistical data with the economic analysis presented in previous reports to the Department. The additional results presented here fully confirm our earlier conclusions that the data collection system is functioning properly.

Respectfully yours,

/s/ Lilli A. Gordon  
LILLI A. GORDON  
Economist  
Regulation & Economics

/s/ Irving H. Plotkin  
IRVING H. PLOTKIN  
Vice President & Director  
Regulation & Economics

pjv

RX 370C

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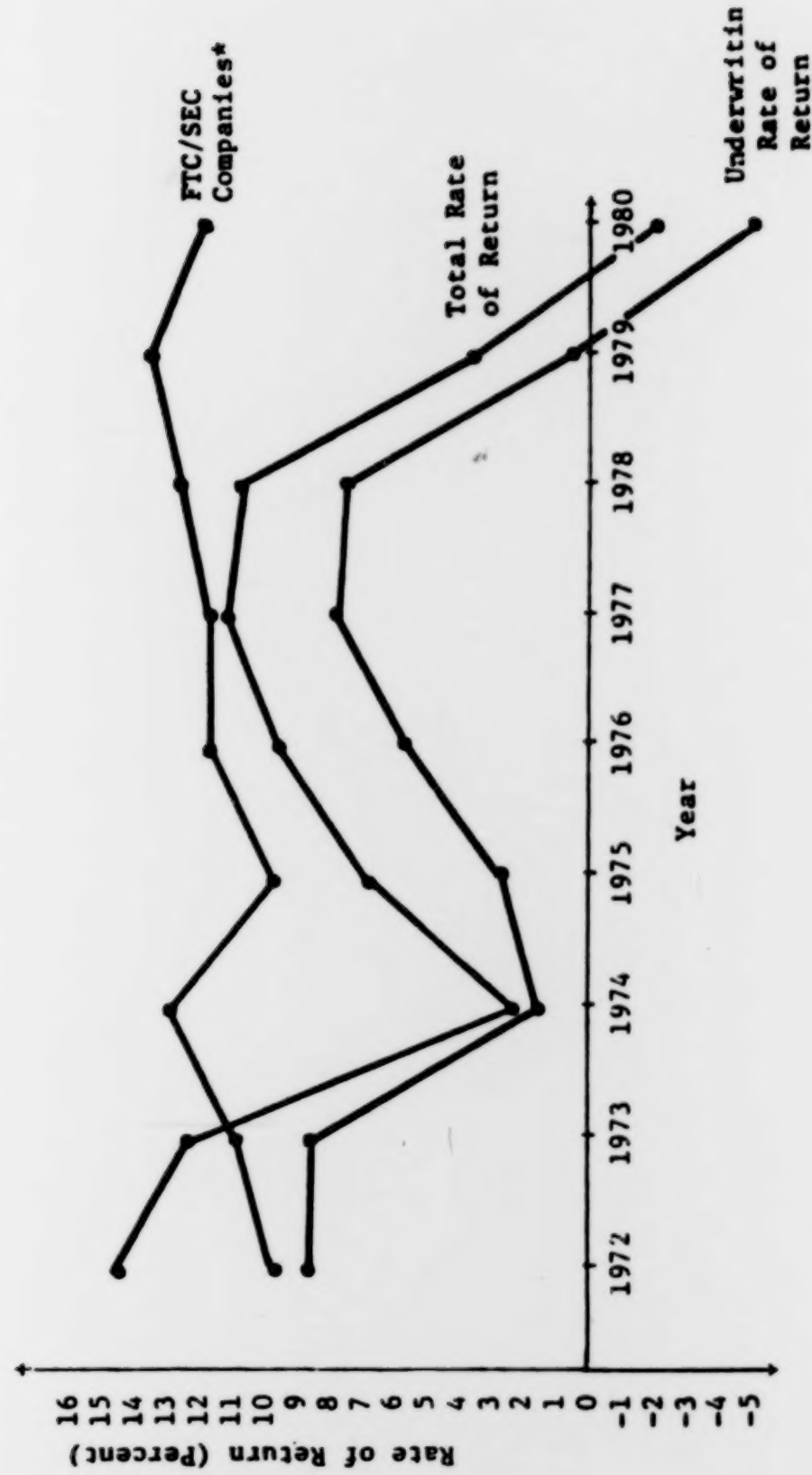


**FIGURE 1**

**AFTER-TAX RATES OF RETURN ON TOTAL CAPITAL  
OF THE WISCONSIN TITLE INSURANCE INDUSTRY**

**WISCONSIN OPERATIONS**

**1972-1980**

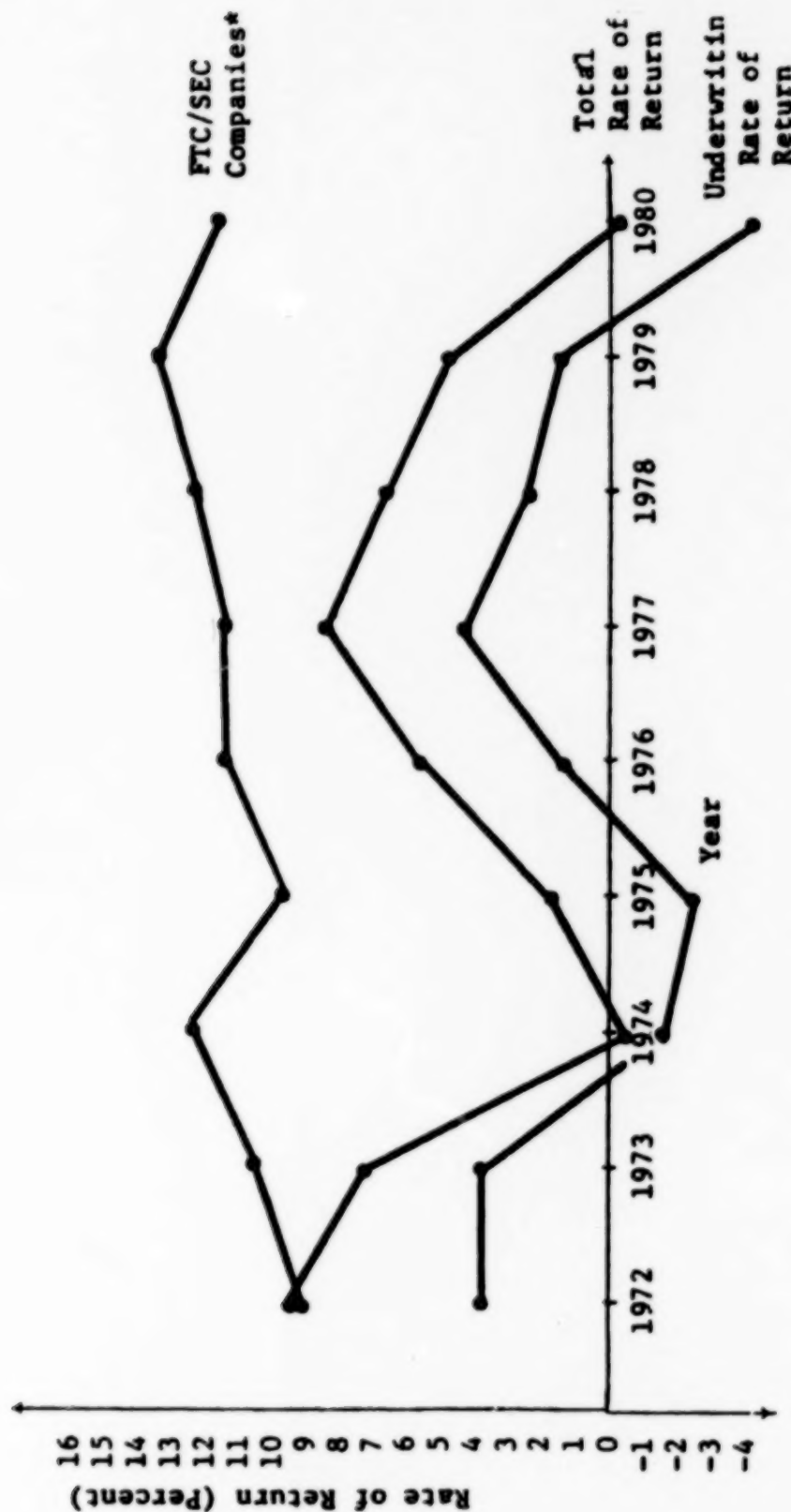


\*After-tax rates of return on total capital, FTC/SEC companies. See Tables 7 and 10.

**FIGURE 2**

**AFTER-TAX RATES OF RETURN ON TOTAL CAPITAL  
OF THE WISCONSIN TITLE INSURANCE INDUSTRY  
OTHER STATES' OPERATIONS**

**1972-1980**



\*After-tax rates of return on total capital, FTC/SEC companies. See Tables 8 and 10.



[RESPONDENT'S TRIAL EXHIBIT  
RX 377]

WISCONSIN TITLE INSURANCE  
RATE SERVICE ORGANIZATION  
2100 Marine Plaza  
Milwaukee, Wisconsin 53202

October 21, 1982

Mr. Norman Wirtz  
c/o Wisconsin Insurance Dept.  
123 West Washington Avenue  
Madison, Wisconsin 53702

Dear Norman:

Enclosed please find my copy of the Economic Analysis of the Wisconsin Title Insurance Industry 1972-81, as prepared by Arthur D. Little, Inc. I was somewhat surprised that you said your department had not received a copy before.

I appreciated the time spent in reviewing the material submitted by me for the rate increase proposal as recommended by the membership of the Rate Bureau.

Respectfully,

DONALD E. GRABSKI  
President

Encl (1)

cc: Mr. Irvin H. Plotkin

**[RESPONDENTS TRIAL EXHIBIT  
RX 514]**

August 28, 1980

Mr. George E. Hursig, Vice President  
Chicago Title Insurance Company  
111 West Washington Street  
Chicago, Illinois 60602

RE: JULY 10TH RATE FILING

This is in confirmation of our meeting, yesterday, with Mr. James, Mr. Bonita and you, in our office.

Even though we still object to the use of inadequate rates, in view of the present circumstances surrounding the title insurance industry in our State, and your assurances that your company has already taken some steps to reverse the profitability trend, we are withdrawing our objection to the captioned submission.

However, should the additional data you agreed to provide this office, as available, indicate that the use of the rates has not brought forth the desired results and profits continue to decline, we will have no alternative but to request that you either increase rates or discontinue the sale of title insurance in our state.

Additionally, we would appreciate your giving consideration to the organization of an advisory committee to provide this office with a profitability study on the business of title insurance in Montana. I would appreciate the opportunity of discussing this with you at the Zone VI meeting in San Diego, next month.

Sincerely,

E. V. "SONNY" OMHOLT  
State Auditor & Ex Officio  
Commissioner of Insurance

Josephine M. Driscoll, CPIW  
Chief Deputy Insurance Commissioner

JMD:s

cc: Mr. Joseph C. Bonita  
Mr. Ted James—9/2/80

## [JOINT PHYSICAL EXHIBIT]

\* \* \* \* \*

ARIZ. REV. STAT. ANN.

\* \* \* \* \*

## § 20-341. Purpose of insurance rate regulation

The purpose of this article is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this article. Nothing in this article is intended to prohibit or discourage reasonable competition, or to prohibit or encourage, except to the extent necessary to accomplish the purpose stated in this section, uniformity in insurance rates, rating systems, rating plans or practices. This article shall be liberally interpreted to carry into effect the provisions of this section.

## § 20-365. Cooperation in rate making

Cooperation among rating organizations and among rating organizations and insurers in rate making and in other matters within the scope of this article is authorized, if the filings resulting from such cooperation are subject to the provisions of this article. The director may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this article, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent, and requiring the discontinuance of such activity or practice.

## § 20-375. Making of title insurance and escrow rates

A. Every title insurer that shall make its own rates, and every title insurance rating organization, shall make rates that are not excessive nor inadequate for the safety and soundness of any title insurer, which do not unfairly discriminate between risks in this state which involve essentially the same exposure to loss and expense elements, and which shall give due consideration to the following matters:

1. The desirability for stability of rate structures;
2. The necessity, by encouraging growth in assets of title insurers in periods of high business activity, of assuring the financial solvency of title insurers in periods of economic depression; and
3. The necessity for paying dividends on the capital stock of title insurers sufficient to induce capital to be invested therein.

B. Every title insurer that shall make its own rates, and every title insurance rating organization, shall adopt basic classifications of policies or contracts of title insurance or escrow services which shall be used as the basis for rates.

C. Rates within each rate classification may, at the discretion of the title insurer which files its own rates, or at the discretion of the title insurance rating organization, be less than the cost of the expense elements in the case of smaller insurances or escrows, and the excess may be charged against the larger insurances or escrows without rendering the rates unfairly discriminatory.

D. There shall be no combined rate for the issuance of title insurance policies and escrow services rendered in connection with such insurance.

Amended by Laws 1977, Ch. 48, § 2.

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§ 20-376. Filing of title insurance and escrow rates

A. Every title insurer shall file with the director its schedules of fees, every manual of classifications, rules and plans pertaining thereto, and every modification of any of the foregoing which it proposes to use in this state. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage or service contemplated.

B. A title insurer may satisfy its obligations to make such filings by becoming a member of, or a subscriber to, a licensed title insurance rating organization which makes such filings, and by authorizing the director to accept such filings on its behalf.

C. Every title insurer shall make its filings directly or through a licensed title insurance rating organization which makes such filings, and all such filings may, at the option of such insurer, govern all of its or certain designated agents in this state, provided that any such insurer may elect to permit all or certain of its agents to make rate filings directly or to become a subscriber to a licensed title insurance rating organization which makes such filings.

D. The director shall make such review of the filings as may be necessary to carry out the provisions of this article.

E. Subject to the provisions of subsection H of this section, each filing shall be on file for a period of fifteen days before it becomes effective. The director may, upon written notice given within such period to the person making the filing, extend such waiting period for an additional period, not to exceed fifteen days, to enable him to complete the review of the filing. Further extensions of such waiting period may also be made with the consent of the person making the filing. Upon written application by the person making the filing, the director may authorize a filing or any part thereof which he has reviewed, to become effective before the expiration of the waiting period or any extension thereof.

F. Except in the case of rates filed under subsection H of this section, a filing which has become effective shall be deemed to meet the requirements of this article.

G. When the director finds that any rate for a particular kind or class of risk or escrow service cannot practicably be filed before it is used, or any contract or kind of title insurance or escrow service, by reason of rarity or peculiar circumstances, does not lend itself to advance determination and filing of rates, he may, under such rules and regulations as he may prescribe, permit such rate to be used without a previous filing and waiting period.

H. Beginning ninety days after the effective date of this section, no title insurer or title insurance agent shall charge any fee for any policy or contract of title insurance or escrow service except in accordance with filings or rates which are in effect for such title insurer or agent as provided in this section.

I. The director shall not have the power to regulate, or require the filing of, rates or fees for reinsurance policies, contracts or agreements, or for policies, contracts or agreements of excess coinsurance.

Amended by Laws 1977, Ch. 48, § 3.

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§ 20-377. Justification for title insurance and escrow rates

A. A title insurance or escrow rate filing shall be accompanied by a statement of the title insurer, agent, or title insurance rating organization making the filing, setting forth the basis upon which the rate was fixed, and the manner in which fees are to be computed. Any filing may be justified by:

1. The experience or judgment of the title insurer, agent, or title insurance rating organization making the filing,

2. Its interpretation of any statistical data relied upon,
3. The experience of other title insurers, agents, or title insurance rating organizations, or
4. Any other factors which the title insurer, agent, or title insurance rating organization deem relevant.

B. The statement and justification shall be open to public inspection after the rate to which it applies becomes effective.

Amended by Laws 1977, Ch. 48, § 4.

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#### § 20-378. Disapproval of title insurance and escrow filings

A. Before issuing an order of disapproval of a title insurance or escrow rate filing, the director shall hold a hearing upon not less than ten days' written notice, specifying in reasonable detail the matters to be considered at such hearing. Such notice shall be sent to every title insurer, agent, and title insurance rating organization which made such filing. If, after such hearing, the director shall find that such filing or a part thereof does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that it so fails, and stating when, within a reasonable period thereafter, such filing or a part thereof shall be deemed no longer effective if the filing or a part thereof has become effective under the provisions of § 20-376. A title insurer, agent, or title insurance rating organization shall have the right at any time to withdraw a filing or a part thereof, subject to the provisions of § 20-379 in the case of a deviation filing. Copies of every such order shall be sent to every title insurer, agent, and title insurance rating organization affected. Such an order shall not affect any contract or policy made or issued or escrow contracted prior to the expiration of the period set forth therein.

B. Any person or organization aggrieved with respect to any filing which is in effect may make written applica-

tion to the director for a hearing thereon but the title insurer or title insurance rating organization which made the filing shall not be authorized to proceed under this subsection. Such an application shall specify in reasonable detail the grounds to be relied upon by the applicant. If the director shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty days after receipt of such application, hold a hearing upon not less than ten days' written notice to the applicant and to every title insurer, agent, and title insurance rating organization which made such a filing. If, after such hearing, the director finds that the filing or a part thereof does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing or a part thereof fails to meet the requirements of this article, stating when within a reasonable period thereafter such filing or a part thereof shall be deemed no longer effective. Copies of such an order shall be sent to the applicant and to every such title insurer, agent, and title insurance rating organization. Such an order shall not affect any contract or policy made or issued prior to the expiration of the period set forth therein.

C. No filing nor any modification thereof shall be disapproved if the rates in connection therewith meet the requirements of this article.

Amended by Laws 1977, Ch. 48, § 5.

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#### CONN. GEN. STAT. ANN.

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#### § 38-4. Duties of commissioner

The commissioner shall see that all laws respecting insurance companies are faithfully executed; shall pay to the treasurer all the fees which he has received and may administer oaths in the discharge of his duties. He shall



recommend to the general assembly changes which, in his opinion, should be made in the laws relating to insurance.

(1949 Rev., § 6029; 1959, P.A. 78, § 1.)

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Sec. 38-201c. Standards for the making and use of rates re commercial risk insurance. The following standards, methods and criteria shall apply to the making and use of rates pertaining to commercial risk insurance:

(a) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory. No rate shall be held to be excessive unless (1) such rate is unreasonably high for the insurance provided or (2) a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable. No rate shall be held inadequate unless (A) it is unreasonably low for the insurance provided, and (B) continued use of it would endanger solvency of the insurer, or unless (C) such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or, if continued, will have the effect of destroying competition or creating a monopoly.

(b) Consideration shall be given, to the extent possible, to past and prospective loss experience within and outside this state, to conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to past and prospective expenses both country-wide and those specially applicable to this state, to investment income earned or realized by insurers both from their unearned premium and loss reserve funds, and to all other factors, including judgment factors, deemed relevant within and outside this state and in the case of fire insurance rates, consideration may be given to the experience of the fire insurance business during the most recent five-year period for which such experience is available. Consideration may be given in the making and use of rates to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.

(c) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof.

(d) Risks may be grouped by classifications for the establishment of rates and minimum premiums, provided no surcharge on any motor vehicle liability or physical damage insurance premium may be assigned for (1) any accident involving only property damage of six hundred dollars or less or (2) any violation of section 14-219, unless such violation results in the suspension or revocation of the operator's license under section 14-111b; or (3) less than three violations of section 14-218a within any one-year period. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which provide for recognition of variations in hazards or expense provisions or both. Such rating plans may include application of the judgment of the insurer and may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(e) Each rating plan shall establish appropriate eligibility criteria for determining significant risks which are to qualify under the plan, provided all such plans shall include as an eligible significant risk the state of Connecticut or its instrumentalities. Rating plans which comply with the provisions of this subsection shall be deemed to produce rates which are not unfairly discriminatory.

(f) The commissioner may adopt regulations in accordance with the provisions of chapter 54 concerning rating plans to effectuate the provisions of this section.

(1969, P.A. 665, S. 3; P.A. 77-199, S. 2, 12; 77-200; P.A. 78-25; P.A. 79-204, S. 1, 3; 79-609, S. 4; P.A. 80-276, S. 2, 6; P.A. 82-353, S. 4, 26; P.A. 84-165, S. 1.)

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Sec. 38-201d. Insurers concerted action re rate making; preparation of policies, etc. Subject to and in compliance with the provisions of sections 38-201a to 38-201s, inclusive, authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policies or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data or carrying on of research.

(1969, P.A. 665, S. 4.)

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Sec. 38-201m. Records and information to be maintained. Approval of rules and statistical plans re loss and expense experience. (a) Every insurer, rating organization or advisory organization and every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance shall maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of its experience or the experience of its members and of the data, statistics or information collected or used by it in connection with the rates, rating plans, rating systems, underwriting rules, policy or bond forms, surveys or inspections made or used by it so that such records will be available at all reasonable times to enable the insurance commissioner to determine whether such organization, insurer, group or association, and, in the case of an insurer or rating organization, every rate, rating plan or rating system made or used by it, complies with the provisions of this chapter applicable to it. The maintenance of such records in the office of a licensed rating organization or advisory organization of which an insurer is a member or subscriber will be sufficient compliance with this section for any insurer maintaining membership or subscribership in

such organization, to the extent that the insurer uses the rates, rating plans, rating systems or recommendations of such organization.

(b) The insurance commissioner shall approve reasonable rules and statistical plans, reasonably adapted to each of the rating systems used, and which shall thereafter be used by each admitted insurer in the recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of countrywide expense experience. In approving such rules and plans, the commissioner shall give due consideration to the rating systems in use in this state and in other states. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system used by it provided that with respect to private passenger nonfleet automobile insurance, the commissioner may require that claims and loss experience data be allocated, compiled and reported by town. The commissioner may designate one or more rating organizations or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the commissioner, to insurers and rating organizations.

(1969, P.A. 665, S. 13; P.A. 77-614, S. 163, 610; P.A. 80-482, S. 311, 348; P.A. 82-353, S. 9.)

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Sec. 38-201n. Review of rating plans and rules and form of commercial risk insurance contracts. (a) With respect to rates pertaining to commercial risk insurance, and subject to the provisions of subsection (b) of this section with respect to workers' compensation and employers' liability insurance, on or before the effective date

thereof, every admitted insurer shall submit to the insurance commissioner for his information, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every manual of classifications, rules and rates, and every minimum, class rate, rating plan, rating schedule and rating system and any modification of the foregoing which it uses. Such submission by a licensed rating organization of which an insurer is a member or subscriber shall be sufficient compliance with this section for any insurer maintaining membership or subscribership in such organization, to the extent that the insurer uses the manuals, minimums, class rates, rating plans, rating schedules, rating systems, policy or bond forms of such organization. The information shall be open to public inspection after its submission.

(b) Each filing as described in subsection (a) of this section for workers' compensation or employers' liability insurance shall be on file with the insurance commissioner for a waiting period of thirty days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed thirty days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner within the waiting period or any extension thereof. If, within the waiting period or any extension thereof, the commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing, specifying therein in what respects he finds such filing fails to meet

the requirements of this chapter and stating that such filing shall not become effective. Such finding of the commissioner shall be subject to review as provided in section 38-349.

(c) The form of any insurance policy or contract the rates for which are subject to the provisions of this chapter, other than fidelity, surety or guaranty bonds, and the form of any endorsement modifying such insurance policy or contract, shall be filed with the insurance commissioner prior to its issuance. If at any time the commissioner finds that any such policy, contract or endorsement is not in accordance with such provisions or any other provision of law, he may issue an order disapproving the issuance of such form and stating his reasons therefor. The provisions of section 38-349 shall apply to any such order issued by the commissioner.

(1969, P.A. 665, S. 14; 1971, P.A. 498; P.A. 75-8; P.A. 77-614, S. 163, 610; P.A. 79-376, S. 61; P.A. 80-482, S. 312, 348; P.A. 81-94; P.A. 82-353, S. 10, 26.)

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Sec. 38-201p. Complaint and hearing. Practices prohibited. Suspension and revocation of certificate of authority or license. Appeals. (a) Any person aggrieved by any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization may request the insurer or rating organization to review the manner in which the rate, plan, system or rule has been applied with respect to insurance afforded him. Such request may be made by his authorized representative, and shall be in writing. If the request is not granted within thirty days after it is made, the requester may treat it as rejected. Any person aggrieved by the action of an insurer or rating organization in refusing the review requested, or in failing or refusing to grant all or part of the relief requested, may file a written complaint and request for hearing



with the insurance commissioner, specifying the grounds relied upon. If said commissioner has information concerning a similar complaint he may deny the hearing. If he believes that probable cause for the complaint does not exist or that the complaint is not made in good faith he shall deny the hearing. Otherwise, and if he finds that the complaint charges a violation of sections 38-201a to 38-201s, inclusive, and that the complainant could be aggrieved if the violation is proven, he shall proceed as provided in subsection (b) of this section.

(b) If after examination of an insurer, rating organization, advisory organization, or group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, or upon the basis of other information, or upon sufficient complaint as provided in subsection (a) of this section, the insurance commissioner has good cause to believe that such insurer, organization, group or association or any rate, rating plan or rating system made or used by any such insurer or rating organization, does not comply with the requirements and standards of said sections applicable to it, he shall, unless he has good cause to believe such noncompliance is wilful, give notice in writing to such insurer, organization, group or association stating therein what manner and to what extent such noncompliance is alleged to exist and specifying therein a reasonable time, not less than ten days thereafter, in which such noncompliance may be corrected. Notices under this section shall be confidential as between said commissioner and the parties unless a hearing is held in accordance with the provisions of subsection (c) of this section.

(c) If the insurance commissioner has good cause to believe such noncompliance to be wilful, or if within the period prescribed by said commissioner in the notice required by subsection (b) of this section the insurer, organization, group or association does not make such changes as may be necessary to correct the noncompliance

specified by said commissioner or establish to the satisfaction of said commissioner that such specified noncompliance does not exist, then said commissioner may hold a public hearing in connection therewith, provided within a reasonable period of time, which shall be not less than ten days before the date of such hearing, he shall mail a written notice specifying the matters to be considered at such hearings to such insurer, organization, group or association. If no notice has been given as provided in subsection (b) of this section such notice shall state therein in what manner and to what extent noncompliance is alleged to exist. The hearing shall not include any additional subjects not specified in the notices required by said subsection (b).

(d) If after a hearing pursuant to subsection (c) of this section, the insurance commissioner finds (1) that any rate, rating plan or rating system violates the provisions of sections 38-201a to 38-201s, inclusive, applicable to it, he may issue an order to the insurer or rating organization which has been the subject of the hearing specifying in what respects such violation exists and stating when, within a reasonable period of time, the further use of such rate or rating system by such insurer or rating organization in contracts of insurance made thereafter shall be prohibited; (2) that an insurer, rating organization, advisory organization, or a group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, is in violation of the provisions of said sections applicable to it other than the provisions dealing with rates, rating plans or rating systems, he may issue an order to such insurer, organization, group or association which has been the subject of the hearing specifying in what respects such violation exists and requiring compliance within a reasonable time thereafter; (3) that the violation of any of the provisions of said sections applicable to it by any insurer or rating organization which has been the subject of hearing was wilful, he may suspend or revoke, in whole or in part, the



certificate of authority of such insurer or the license of such rating organization with respect to the class of insurance which has been the subject matter of the hearing; (4) that any rating organization has wilfully engaged in any fraudulent or dishonest act or practices, he may suspend or revoke, in whole or in part, the license of such organization in addition to any other penalty provided in said sections; (5) in addition to other penalties provided by law the insurance commissioner may suspend or revoke, in whole or in part, the license of any rating organization or the certificate of authority of any insurer with respect to the class or classes of insurance specified in such order, which fails to comply within the time limited by such order or any extension thereof which said commissioner may grant, with an order of said commissioner lawfully made by him pursuant to this subsection and effective pursuant to subdivision (7) of this subsection; (6) except as otherwise provided in sections 38-201a to 38-201s, inclusive, all proceedings in connection with the denial, suspension or revocation of a license or certificate of authority under said sections shall be conducted in accordance with the provisions of section 38-20 and the insurance commissioner shall have all the powers granted to him therein; (7) any findings, determination, rule, ruling or order made by the insurance commissioner, in accordance with the provisions of said sections, shall be subject to review by appeal in accordance with the provisions of section 4-183. Such appeal may be filed at any time before the effective date of such finding, determination, rule, ruling or order. No such finding, determination, rule, ruling or order shall become effective before the expiration of twenty days after notice and a copy thereof are mailed or delivered to the person affected, and any finding, determination, rule, ruling or order of said commissioner so submitted for review shall not become effective for a further period of fifteen days after the petition for review is filed with the court. The

court may stay the effectiveness thereof for a longer period.

(1969, P.A. 665, S. 16; P.A. 76-436, S. 633, 681; P.A. 77-603, S. 118, 125, 77-614, S. 163, 610; P.A. 78-331, S. 35, 58; P.A. 80-482, S. 314, 348.)

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Sec. 38-201v. Standards for the making and use of rates re personal risk insurance. Regulations. The following standards, methods and criteria shall apply to the making and use of rates pertaining to personal risk insurance:

(a) Rates shall not be excessive, inadequate or unfairly discriminatory.

(1) A rate in a competitive market is not excessive. A rate in a noncompetitive market including a rate for insurance provided pursuant to section 38-114f, 38-185l or 38-201h is excessive if it is unreasonably high for the insurance provided.

(2) No rate shall be held inadequate unless (A) it is unreasonably low for the insurance provided, and (B) continued use of it would endanger solvency of the insurer, or unless (C) such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or, if continued will have, the effect of destroying competition or creating a monopoly.

(b) In determining whether rates comply with the excessiveness standard in a noncompetitive market under subdivision (1) of subsection (a) of this section, the inadequacy standard under subdivision (2) of subsection (a) of this section and the requirement that rates not be unfairly discriminatory, the following criteria shall apply:

(1) Consideration may be given, to the extent possible, to past and prospective loss experience within and outside this state, to conflagration and catastrophe hazards, to a reasonable margin for underwriting profit and con-

tingencies, to past and prospective expenses both country-wide and those specially applicable to this state, to investment income earned or realized by insurers both from their unearned premium and loss reserve funds, and to all other factors, including judgment factors, deemed relevant within and outside this state and in the case of fire insurance rates, consideration may be given to the experience of the fire insurance business during the most recent five-year period for which such experience is available. Consideration may be given in the making and use of rates to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.

(2) The systems of expense provisions included in the rates for use by an insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof.

(3) Risks may be grouped by classifications for the establishment of rates and minimum premiums, provided that with respect to private passenger nonfleet automobile insurance, any change in territorial classifications shall be subject to prior approval by the insurance commissioner, and provided no surcharge on any motor vehicle liability or physical damage insurance premium may be assigned for (A) any accident involving only property damage of six hundred dollars or less; or (B) any violation of section 14-219 unless such violation results in the suspension or revocation of the operator's license under section 14-111b; or (C) less than three violations of section 14-218a within any one-year period. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which provide for recognition of variations in hazards or expense provisions or both. Such rating plans may include application of the judgment of the insurer and may measure any dif-

ferences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(4) Each rating plan shall establish appropriate eligibility criteria for determining significant risks which are to qualify under the plan. Rating plans which comply with the provisions of this subdivision shall be deemed to produce rates which are not unfairly discriminatory.

(5) The commissioner may adopt regulations in accordance with the provisions of chapter 54 concerning rating plans to effectuate the provisions of this section.

(P.A. 82-353, S. 5, 26; P.A. 84-165, S. 2.)

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Sec. 38-201x. Review of rates re personal risk insurance and residual markets in competitive or noncompetitive markets. (a) The following procedures shall apply with respect to rates pertaining to personal risk insurance and residual markets:

(1) In a competitive market, every insurer shall file with the commissioner all rates and supplementary rate information to be used in this state, provided that such rates and information need not be filed for inland marine risks which by general custom of the business are not written according to manual rules or rating plans. No such filings may be made by a rating organization on behalf of any insurer. Such rates and supplementary rate information shall be filed by the effective date of the filing or the date that premium billing notices reflecting the new rates are sent to insureds or agents, whichever is earlier. In a competitive market, if the commissioner finds, after a hearing, that an insurer's rates require closer supervision because of the insurer's financial condition or unfairly discriminatory rating practices, the insurer shall file with the commissioner at least thirty days before the effective date, all such rates and such supplementary rate information and supporting information as prescribed by the commissioner. Upon application



by the filer, the commissioner may authorize an earlier effective date for the filing.

(2) In a noncompetitive market, every insurer shall file with the commissioner all rates and supplementary rate information for that market and such supporting information as is required by the commissioner. For purposes of subsection (d) of section 7-479e, subdivision (9) of section 38-61, section 38-175f, subsection (a) of section 38-175h, sections 38-175x, 38-201a and 38-201c, subsection (b) of section 38-201j, sections 38-201k, 38-201m, 38-201n, 38-201r, 38-201v to 38-201dd, inclusive, and 38-342 to 38-344, inclusive, residual markets, title insurance and credit property insurance are deemed to be noncompetitive markets. All rates and supplementary rate information and such supporting information as is required by the commissioner, shall also be filed with the commissioner for insurance provided pursuant to section 38-114f, 38-185l or 38-201h. Such rates and supplementary rate information and supporting information required by the commissioner shall be on file with the commissioner for a waiting period of thirty days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed thirty days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner within the waiting period or any extension thereof. If, within the waiting period or any extension thereof, the commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing, specifying therein in what respects he finds

such filing fails to meet the requirements of this chapter and stating that such filing shall not become effective. Such finding of the commissioner shall be subject to review as provided in section 38-349.

(3) An insurer may file rates by reference, with or without deviation, to rates charged by another insurer which were filed and are in effect if the insurer's direct written premium for the applicable line of insurance is less than one-half of one percent of the total statewide direct written premium for that line, as determined from the annual statements filed by insurers licensed to do business in this state and as calculated by the National Association of Insurance Commissioners from its data base. Supporting information shall not be required for rates filed by reference pursuant to this subsection. For purposes of this subdivision the term "insurer" shall include two or more admitted insurers having a common ownership or operating in this state under common management or control.

(4) Rates filed pursuant to this section shall be filed in such form and manner as is prescribed by the commissioner. Whenever a filing made pursuant to subdivision (1) or (2) of subsection (a) of this section is not accompanied by the information upon which the insurer supports such filing and the commissioner does not have sufficient information to determine whether such filing meets the requirements of this chapter, he shall require such insurer to furnish the information upon which it supports such filing and in such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include (A) the experience or judgment of the insurer making the filing, (B) its interpretation of any statistical data it relies upon, (C) the experience of other insurers or (D) any other relevant factors.

(5) All rates, supplementary rate information and any supporting information for risks filed under subsection (d) of section 7-479e, subdivision (9) of section 38-61,



section 38-175f, subsection (a) of section 38-175h, sections 38-175x, 38-201a and 38-201c, subsection (b) of section 38-201j, sections 38-201k, 38-201m, 38-201n, 38-201r, 38-201v to 38-201dd, inclusive, and 38-342 to 38-344, inclusive, shall, as soon as filed, be open to public inspection at any reasonable time. Copies may be obtained by any person on request and upon payment of a reasonable charge.

(b) Rates for insurance described in subsection (a) of this section shall be subject to review as follows:

(1) Rates subject to prefiling under subdivision (1) or (2) of subsection (a) of this section may be reviewed and disapproved before their effective date, provided that rates for insurance provided pursuant to section 38-114f, 38-185l or 38-201h shall not be effective until approved by the commissioner. Any rate may be reviewed and disapproved subsequent to its effective date.

(2) The commissioner may disapprove a rate if the insurer fails to comply with the filing requirements of this section. The commissioner shall disapprove a rate for use in a competitive market if he finds that the rate is inadequate or unfairly discriminatory under subsection (a) of section 38-201v. The commissioner shall disapprove a rate for use in a noncompetitive or residual market if he finds the rate is excessive, inadequate or unfairly discriminatory under subsection (a) of section 38-201v.

(3) If the commissioner finds that a reasonable degree of competition does not exist in a market in accordance with section 38-201w, he may require that the insurers in that market file supporting information with respect to existing rates. If the commissioner believes that such rates may violate any of the requirements of subsection (d) of section 7-479e, subdivision (9) of section 38-61, section 38-175f, subsection (a) of section 38-175h, sections 38-175x, 38-201a, 38-201c, subsection (b) of section 38-201j, sections 38-201k, 38-201m, 38-201n, 38-201r,

38-201v to 38-201dd, inclusive, and 38-342 to 38-344, inclusive, he may proceed as provided in section 38-201p. If the commissioner believes that rates in a competitive market violate the inadequacy or unfair discrimination standards in section 38-201v or any other applicable requirement of subsection (d) of section 7-479e, subdivision (9) of section 38-61, section 38-175f, subsection (a) of section 38-175h, sections 38-175x, 38-201a, 38-201c, subsection (b) of section 38-201j, sections 38-201k, 38-201m, 38-201n, 38-201r, 38-201v to 38-201dd, inclusive, and 38-342 to 38-344, inclusive, he may require the insurers in that market to file supporting information with respect to existing rates. If after reviewing the supporting information, the commissioner continues to believe that such rates may violate these requirements, he may proceed as provided in section 38-201p. The commissioner may disapprove, without hearing, rates prefled pursuant to subdivision (1) or (2) of subsection (a) of this section that have not become effective, provided that the insurer whose rates have been disapproved shall be given a hearing pursuant to section 38-349.

(4) If the commissioner disapproves a rate, he shall issue an order specifying the respects in which it fails to meet the requirements of subsection (d) of section 7-479e, subdivision (9) of section 38-61, section 38-175f, subsection (a) of section 38-175h, sections 38-175x, 38-201a, 38-201c, subsection (b) of section 38-201j, sections 38-201k, 38-201m, 38-201n, 38-201r, 38-201v to 38-201dd, inclusive, and 38-342 to 38-344, inclusive. For rates in effect at the time of the disapproval, the commissioner shall state, within a reasonable period of time, when the further use of such rate in contracts of insurance made thereafter shall be prohibited. The order shall be issued within thirty days after the hearing or within such reasonable time extension as the commissioner may determine. Such order may include a provision for premium adjustment for the period after the effective date of the order for policies in effect on such date.

(5) Whenever an insurer has no legally effective rates as a result of the commissioner's disapproval of rates or other act, the commissioner shall specify interim rates. Upon appeal from any such order of the commissioner the court may, upon request of the appealing insurer, stay such order, provided that the insurer places in an escrow account the difference, as received, between the disapproved rates and the interim rates specified by the commissioner. When new rates become legally effective, the commissioner shall order the escrowed funds to be distributed appropriately, with interest at the legal rate as provided in section 37-1, except that minimal refunds to policyholders are not required to be distributed.

(P.A. 82-353, S. 11, 26.)

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33-1-311. General powers and duties. (1) The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code.

(2) The commissioner shall have the powers and authority expressly conferred upon him by or reasonably implied from the provisions of this code.

(3) The commissioner may conduct such examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, as he may deem proper to determine whether any person has violated any provision of this code or to secure information useful in the lawful administration of any such provision. The cost of such additional examinations and investigations shall be borne by the state.

(4) The commissioner shall have such additional powers and duties as may be provided by other laws of this state.

History: En. Sec. 28, Ch. 286, L. 1959; amd. Sec. 1, Ch. 16, L. 1969; R.C.M. 1947, 40-2709 (1) thru (3), (5).

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33-1-313. Rules—notice, hearing, and penalty. (1) The commissioner may make reasonable rules necessary for or as an aid to effectuation of any provision of this code, except 33-30-1012. No such rule shall extend, modify, or conflict with any law of this state or the reasonable implications thereof. Any such rule affecting persons or matters other than the personnel or the internal affairs of the commissioner's office shall be made or amended only after a hearing thereon of which notice was given as required by 33-1-703. If reasonably possible the commissioner shall set forth the proposed rule or amendment in or with the notice of hearing. No such rule or amendment as to which a hearing is required shall be effective until it has been on file as a public record in the commissioner's office for at least 10 days.

(2) In addition to any other penalty provided, willful violation of any such rule shall subject the violator to such administrative penalties as may be applicable under this code as for violation of the provision as to which such rule relates.

History: En. Sec. 29, Ch. 286, L. 1959; R.C.M. 1947, 40-2710.

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33-1-315. Witnesses—production of records—subpoena—failure to respond—perjury. (1) With respect to the subject of any examination, investigation, or hearing being conducted by him, the commissioner or his examiner, if general written authority has been given the examiner by the commissioner, may subpoena witnesses and administer oaths or affirmations and examine any individual under oath and may require and compel the production of records, books, papers, contracts, and other documents by attachments, if necessary. If in connection with any examination of an insurer the commissioner desires to examine any officer, director, or manager thereof who is then outside this state, the commissioner may conduct and enforce by all appropriate and available means any such examination under oath in any other state or territory



of the United States in which such officer, director, or manager may then presently be, to the full extent permitted by the laws of such other state or territory, this special authorization considered.

(2) Witness fees and mileage, if claimed, shall be allowed the same as for testimony in a district court. Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized and shall be paid by the person being examined if such person is found to have been in violation of the law as to the matter with respect to which such witness was subpoenaed or by the person, if other than the commissioner, at whose request the hearing is held.

(3) Subpoenas of witnesses shall be served in the same manner as if issued from a district court. If any individual fails to obey a subpoena lawfully served, the commissioner shall report such disobedience, together with a copy of the subpoena and proof of service thereof, to the district court for the county in which the individual was required to appear. Such court shall cause such individual to be produced and shall impose penalties as though he had disobeyed a subpoena issued out of such court.

(4) Any person knowingly failing to attend, answer, or produce records, documents, or other evidence requested by the commissioner or who knowingly fails to give the commissioner full and truthful information and answer in writing to any material written inquiry of the commissioner, relative to the subject of any such examination, investigation, or hearing, or knowingly fails to appear and testify under oath before the commissioner is guilty of a misdemeanor.

(5) Any person knowingly testifying falsely under oath as to any matter material to any such examination, investigation, or hearing is guilty of perjury, and upon conviction shall be punished according to 45-7-201.

History: En. Sec. 37, Ch. 286, L. 1959; R.C.M. 1947, 40-2718; amd. Sec. 5, Ch. 198, L. 1979.

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33-1-317. Penalty imposed by commissioner. The commissioner may, after having conducted a hearing pursuant to 33-1-701, impose a fine not to exceed the sum of \$5,000 upon a person found to have violated any provision of this code, except 33-30-1012, or regulation duly promulgated by the commissioner, except that the fine imposed upon agents or adjusters shall not exceed \$500. Said fine shall be in addition to all other penalties imposed by the laws of this state and shall be collected by the commissioner in the name of the state of Montana. Imposition of any fine hereunder shall be an order from which an appeal may be taken, pursuant to the provisions of 33-1-711.

History: En. Sec. 28, Ch. 286, L. 1959; amd. Sec. 1, Ch. 16, L. 1969; R.C.M. 1947, 40-2709 (4).

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33-16-101. Purpose and intent. (1) The purpose of this chapter is to promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory, to authorize the existence and operation of qualified rating organizations and advisory organizations and require that specified rating services of such rating organizations be generally available to all admitted insurers, and to authorize cooperation between insurers in rate-making and other related matters.

(2) It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise.

History: En. Sec. 1, Ch. 362, L. 1969; R.C.M. 1947, 40-3634.

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33-16-111. Issuance of order—suspension or revocation of certificate of authority or license. If, after a hearing pursuant to 33-16-206, the commissioner finds:

(1) that an insurer, rating organization, advisory organization, or a group, association, or other organization of insurers which enagages in joint underwriting or joint reinsurance is in violation of the provisions of this chapter applicable to it, other than the provisions dealing with rates, rating plans, or rating systems, he may issue an order to such insurer, organization, group, or association which has been the subject of the hearing, specifying in what respects such violation exists and requiring compliance within a reasonable time thereafter;

(2) that the violation of any of the provisions of this chapter applicable to it by any insurer or rating organization which has been the subject of hearing was willful, he may suspend or revoke, in whole or in part, the certificate of authority of such insurer or the license of such rating organization with respect to the class of insurance which has been the subject matter of the hearing;

(3) that any rating organization has willfully engaged in any fraudulent or dishonest act or practices, he may suspend or revoke, in whole or in part, the license of such organization, in addition to any other penalty provided in this chapter.

History: En. Sec. 29, Ch. 362, L. 1969; R.C.M. 1947, 40-3662 (part).

33-16-112. Failure to comply with order—suspension or revocation of license or certificate. In addition to other penalties provided in this code, the commissioner may suspend or revoke, in whole or in part, the license of any rating organization or the certificate of authority of any insurer with respect to the class or classes of insurance specified in such order which fails to comply within the time limited by such order or any extension thereof

which the commissioner may grant, with an order of the commissioner lawfully made by him pursuant to 33-16-111 and 36-16-211 and effective pursuant to 33-16-113.

History: En. Sec. 30, Ch. 362, L. 1969; R.C.M. 1947, 40-3663.

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33-16-201. Standards applicable to rates. The following standards shall apply to the making and use of rates pertaining to all classes of insurance to which the provisions of this chapter are applicable:

(1) (a) Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.

(b) No rate shall be held to be excessive unless such rate is unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.

(c) No rate shall be held to be inadequate unless such rate is unreasonably low for the insurance provided and the continued use of such rate endangers the solvency of the insurer using the same or unless such rate is unreasonably low for the insurance provided and the use of such rate by the insurer using same has, or if continued will have, the effect of destroying competition or creating a monopoly.

(2) (a) Consideration shall be given, to the extent applicable, to past and prospective loss experience within and outside this state, to revenues and profits from reserves, to conflagration and catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to past and prospective expenses, both countrywide and those specially applicable to this state, and to all other factors, including judgment factors, deemed relevant within and outside this state. In the case of fire insurance rates, consideration may be given to the experience of the fire insurance business during the most

recent 5-year period for which such experience is available.

(b) Consideration may also be given in the making and use of rates to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

(3) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the operating methods of any such insurer or group with respect to any kind of insurance or with respect to any subdivision or combination thereof.

(4) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any difference among risks that have a probable effect upon losses or expenses. Classifications or modifications of classifications of risks may be established, based upon size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations, except that no special risk classification may be established based on anything adverse to the insured in a driving record which is 3 years old or older. Such classifications and modifications shall apply to all risks under the same or substantially the same circumstances or conditions.

History: En. Sec. 7, Ch. 362, L. 1969; amd. Sec. 1, Ch. 54, L. 1973; amd. Sec. 1, Ch. 104, L. 1973; R.C.M. 1947, 40-3640.

33-16-202. Recording and reporting of loss and expense experience. (1) The commissioner shall promulgate and may modify reasonable rules and statistical plans, reasonably adapted to each of the rating systems used, and which shall thereafter be used by each insurer in the

recording and reporting of its loss and countrywide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as may be necessary to aid him in determining whether rates comply with the applicable standards of this chapter. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and are not susceptible of determination by a prorating of countrywide expense experience.

(2) In promulgating such rules and plans, the commissioner shall give due consideration to the rating systems in use in this state and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer shall be required to record or report its loss experience on a classification basis that is inconsistent with the rating system used by it.

(3) The commissioner may designate one or more rating organizations or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the commissioner, to insurers and rating organizations.

History: En. Sec. 36, Ch. 362, L. 1969; R.C.M. 1947, 40-3669.

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33-16-203. Rates filed. Every insurer, rating organization, or advisory organization shall file with the commissioner all rates intended for use within this state, together with supporting data sufficient to substantiate such filing. The filing required by this subsection may be made by rating organizations on behalf of their members and subscribers; but this provision does not prohibit a member or subscriber from filing any such rates on its own behalf. Any deviations from a rating organization's rates



by a member or subscriber must be filed with the commissioner and must be accompanied by supporting data.

History: En. Sec. 21, Ch. 362, L. 1969; amd. Sec. 1, Ch. 469, L. 1977; R.C.M. 1947, 40-3654(2); amd. Sec. 1, Ch. 241, L. 1979.

**33-16-204.**—Review of rates on request by aggrieved person. (1) Any person aggrieved by any rate charged, rating plan, rating system, or underwriting rule followed or adopted by an insurer or rating organization may request the insurer or rating organization to review the manner in which the rate, plan, system, or rule has been applied with respect to insurance afforded him. Such request may be made by his authorized representative and shall be written.

(2) If the request is not granted within 30 days after it is made, the requester may treat it as rejected.

(3) Any person aggrieved by the action of an insurer or rating organization in refusing the review requested or in failing or refusing to grant all or part of the relief requested may file a written complaint and request for hearing with the commissioner, specifying the grounds relied upon. If the commissioner has information concerning a similar complaint, he may deny the hearing. If he believes that probable cause for the complaint does not exist or that the complaint is not made in good faith, he shall deny the hearing. Otherwise, and if he finds that the complaint charges a violation of this chapter and that the complainant would be aggrieved if the violation is proven, he shall proceed as provided in 33-16-205.

History: En. Sec. 26, Ch. 362, L. 1969; R.C.M. 1947, 40-3659.

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**33-16-205.** Noncompliance of rates—notice. If, after examination of an insurer, rating organization, advisory organization, or group, association, or other organization of insurers which engages in joint underwriting or joint reinsurance or upon the basis of other information or upon sufficient complaint as provided in 33-16-204, the commissioner has good cause to believe that such insurer,

organization, group, or association or any rate, rating plan, or rating system made or used by any such insurer or rating organization does not comply with the requirements and standards of this chapter applicable to it, he shall, unless he has good cause to believe such noncompliance is willful, give notice, in writing, to such insurer, organization, group, or association operating therein in what manner and to what extent such noncompliance is alleged to exist and specifying therein a reasonable time, not less than 10 days thereafter, in which such noncompliance may be corrected. Notices under this section shall be confidential as between the commissioner and the parties unless a hearing is held under 33-16-206.

History: En. Sec. 27, Ch. 362, L. 1969; R.C.M. 1947, 40-3660.

**33-16-206.** Hearings—notice—subject of hearing. (1) If the commissioner has good cause to believe such noncompliance to be willful or if within the period prescribed by the commissioner in the notice required by 33-16-205 the insurer, organization, group, or association does not make such changes as may be necessary to correct the noncompliance specified by the commissioner or establish to the satisfaction of the commissioner that such specified noncompliance does not exist, then the commissioner may hold a public hearing in connection therewith, provided that within a reasonable period of time, which shall be not less than 10 days before the date of such hearing, he shall mail written notice specifying the matters to be considered at such hearing to such insurer, organization, group, or association. If no notice has been given as provided in 33-16-205, such notice shall state therein in what manner and to what extent noncompliance is alleged to exist.

(2) The hearing shall not include any additional subjects not specified in the notices required by 33-16-205 or this section.

History: En. Sec. 28, Ch. 362, L. 1969; R.C.M. 1947, 40-3661.



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33-16-211. Order prohibiting use of rate or rating system. If, after a hearing pursuant to 33-16-206, the commissioner finds that any rate, rating plan, or rating system violates the provisions of this chapter applicable to it, he may issue an order to the insurer or rating organization which has been the subject of the hearing, specifying in what respects such violation exists and stating when, within a reasonable period of time, the further use of such rate or rating system by such insurer or rating organization in contracts of insurance made thereafter shall be prohibited.

History: En. Sec. 29, Ch. 362, L. 1969; R.C.M. 1947, 40-3662 (part). \* \* \*

33-16-301. Insurers authorized to act in concert. Subject to and in compliance with the provisions of this chapter authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to the making of rates or rating systems, the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations, the furnishing of loss or expense statistics or other information and data, or carrying on of research.

History: En. Sec. 8, Ch. 362, L. 1969; R.C.M. 1947, 40-3641. \* \* \*

33-16-401. Rating organizations—compliance—application. (1) No rating organization shall conduct its operations in this state without first filing with the commissioner a written application for and securing a license to act as a rating organization. Any rating organization may make application for and obtain a license as a rating organization if it shall meet the requirements for license set forth in this chapter.

(2) Every such rating organization shall file with its application:

(a) a copy of its constitution, its articles of incorporation, agreement, or association, and of its bylaws and rules governing the conduct of its business, all duly certified by the custodian or the originals thereof;

(b) a list of its members and subscribers;

(c) the name and address of a resident of this state upon whom notices or orders of the commissioner or process affecting such rating organization may be served; and

(d) a statement of its qualifications as a rating organization.

History: En. Sec. 14, Ch. 362, L. 1969; R.C.M. 1947, 40-3647.

33-16-402. Evidence prerequisite to license. To obtain and retain a license, a rating organization shall provide satisfactory evidence to the commissioner that it will:

(1) permit any admitted insurer to become a member of or a subscriber to such rating organization at a reasonable cost and without discrimination or withdrawal therefrom;

(2) neither have nor adopt any rule or exact any agreement, the effect of which would be to require any member or subscriber, as a condition to membership or subscription, to adhere to its rates, rating plans, rating systems, underwriting rules, or policy or bond forms;

(3) neither adopt any rule nor exact any agreement, the effect of which would be to prohibit or regulate the payment or dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers;

(4) neither practice nor sanction any plan or act of boycott, coercion, or intimidation;

(5) neither enter into nor sanction any contract or act by which any person is restrained from lawfully engaging in the insurance business;

(6) notify the commissioner promptly of every change in its constitution, its articles of incorporation, agree-

ment, or association, and of its bylaws and rules governing the conduct of its business; its list of members and subscribers; and the name and address of the resident of this state designated by it upon whom notices or orders of the commissioner or process affecting such organization may be served;

(7) comply with the provisions of 33-16-105 and 33-16-203.

History: En. Sec. 15, Ch. 362, L. 1969; R.C.M. 1947, 40-3648.

**33-16-403.** Examination of application and investigation of applicant—issuance of license—fee. (1) The commissioner shall examine each application for license to act as a rating organization and the documents filed therewith and may make such further investigation of the applicant, its affairs, and its proposed plan of business as he deems desirable.

(2) The commissioner shall issue the license applied for within 60 days of its filing with him if, from such examination and investigation, he is satisfied that:

(a) the business reputation of the applicant and its officers is good;

(b) the facilities of the applicant are adequate to enable it to furnish the services it proposes to furnish;

(c) the applicant and its proposed plan of operation conform to the requirements of this chapter.

(3) Otherwise, but only after hearing upon notice, the commissioner shall, in writing, deny the application and notify the applicant of his decision and his reasons therefor.

(4) The commissioner may grant an application in part only and issue a license to act as a rating organization for one or more of the classes of insurance or subdivisions thereof or class of risk, or a part of combination thereof as are specified in the application, if the applicant qualifies for only a portion of the classes applied for.

(5) Licenses issued pursuant to this section shall remain in effect until revoked as provided in this chapter. The fee for the license shall be \$100 annually which shall be deposited in the general fund.

History: En. Sec. 16, Ch. 362, L. 1969; amd. Sec. 1, Ch. 206, L. 1973; R.C.M. 1947, 40-3649.

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## 601.41 General duties and powers

(1) Duties. The commissioner shall administer and enforce chs. 600 to 646. The commissioner shall act as promptly as possible under the circumstances on all matters placed before the commissioner.

(2) Powers. The commissioner shall have all powers specifically granted the commissioner, or reasonably implied in order to enable the commissioner to perform the duties imposed by sub. (1).

(3) Rules. The commissioner shall have rule-making authority under s. 227.014(2).

(4) Enforcement proceedings. (a) The commissioner shall issue such prohibitory, mandatory and other orders as are necessary to secure compliance with the law.

(b) On request of any person who would be affected by an order under par. (a), the commissioner may issue a declaratory order to clarify the person's rights or duties.

(5) Informal hearings and public meetings. The commissioner may at any time hold informal hearings and public meetings, whether or not called hearings, for the purposes of investigation, the ascertainment of public sentiment, or informing the public. No effective rule or order may result from the hearing unless the requirements of ch. 227 are satisfied.

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## 601.42 Reports and replies

(1) Reports. The commissioner may require from any person subject to regulation under chs. 600 to 646:

(a) Statements, reports, answers to questionnaires and other information, and evidence thereof, in whatever reasonable form the commissioner designates, and at such reasonable intervals as the commissioner chooses, or from time to time;

(b) Full explanation of the programming of any data storage or communication system in use; and

(c) That information from any books, records, electronic data processing systems, computers or any other information storage system be made available to the commissioner at any reasonable time and in any reasonable manner.

(2) Forms. The commissioner may prescribe forms for the reports under sub. (1) and specify who shall execute or certify such reports. The forms shall be consistent, so far as practicable, with those prescribed by other jurisdictions.

(3) Accounting methods. The commissioner may prescribe reasonable minimum standards and techniques of accounting and data handling to ensure that timely and reliable information will exist and will be available to him.

(4) Replies. Any officer, manager or general agent of any insurer authorized to do or doing an insurance business in this state, any person controlling or having a contract under which the person has a right to control such an insurer, whether exclusively or otherwise, any person with executive authority over or in charge of any segment of such an insurer's affairs, and any insurance agent or other person licensed under chs. 600 to 646 shall reply promptly in writing or in other designated form, to any written inquiry from the commissioner requesting a reply.

(5) Verification. The commissioner may require that any communication made to the commissioner under this section be verified.

(6) Immunity. In the absence of actual malice, no communication to the commissioner required by law or by the commissioner shall subject the person making it to an action for damages for defamation.

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## 601.43 Examinations and alternatives

(1) Power to examine.

(a) *Insurers and other licensees.* Whenever the commissioner deems it necessary in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 646, the commissioner may examine the affairs and condition of any licensee under chs. 600 to 646 or applicant for a license, of any person or organization of persons doing or in process of organizing to do an insurance business in this state, and of any advisory organization serving any of the foregoing in this state.

(b) *Collateral examinations.* So far as reasonably necessary for an examination under par. (a), the commissioner may examine the accounts, records, documents or evidences or transactions, so far as they relate to the examinee, of any officer, manager, general agent, employee, person who has executive authority over or is in charge of any segment of the examinee's affairs, person controlling or having a contract under which the person has the right to control the examinee whether exclusively or with others, person who is under the control of the examinee, or person who is under the control of a person who controls or has a right to control the examinee whether exclusively or with others.

(c) *Availability of records.* On demand every examinee under par. (a) shall make available to the commissioner for examination any of its own accounts, records, documents or evidences of transactions and any of those of the persons listed in par. (b). Failure to do so shall be deemed to be concealment of records under s. 645.41(8), except that if the examinee is unable to obtain accounts, records, documents or evidences of transactions, failure shall not



be deemed concealment if the examinee terminates immediately the relationship with the other person.

(d) *Delivery of records to the office.* On order of the commissioner any licensee under this code shall bring to the office for examination such records as the order reasonably requires.

(2) *Duty to examine.* (a) *Insurers and rate service organizations.* The commissioner shall examine every domestic insurer and every licensed rate service organization at intervals to be established by rule.

(b) *On request.* Whenever the commissioner is requested by verified petition signed by 25 persons interested as shareholders, policyholders or creditors of an insurer alleging that there are grounds for formal delinquency proceedings, the commissioner shall forthwith examine the insurer as to any matter alleged in the petition. Whenever the commissioner is requested to do so by the board of directors of a domestic insurer, the commissioner shall examine the insurer as soon as reasonably possible.

(c) *Specific requirements.* The commissioner shall examine insurers as otherwise required by law.

(3) *Audits or actuarial evaluations.* In lieu of all or part of an examination under subs. (1) and (2), or in addition to it, the commissioner may order an independent audit by certified public accountants or actuarial evaluation by actuaries approved by the commissioner of any person subject to the examination requirement. Any accountant or actuary selected is subject to rules respecting conflicts of interest promulgated by the commissioner. Any audit or evaluation under this section is subject to s. 601.44, so far as appropriate.

(4) *Alternatives to examination.* In lieu of all or part of an examination under this section, the commissioner may accept the report of an audit already made by certified public accountants or actuarial evaluation by actuaries approved by the commissioner, or the report of an examination made by the insurance department of another state or of the examination by another govern-

ment agency in this state, the federal government or another state.

(5) *Purpose and scope of examination.* An examination may but need not cover comprehensively all aspects of the examinee's affairs and condition. The commissioner shall determine the exact nature and scope of each examination, and in doing so shall take into account all relevant factors, including but not limited to the length of time the examinee has been doing business, the length of time the examinee has been licensed in this state, the nature of the business being examined, the nature of the accounting records available and the nature of examinations performed elsewhere. The examination of an alien insurer shall be limited to insurance transactions and assets in the United States unless the commissioner orders otherwise after finding that extraordinary circumstances necessitate a broader examination.

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#### 625.11 Rate standards

(1) *General.* Rates shall not be excessive, inadequate or unfairly discriminatory, nor shall an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.

(2) *Excessiveness.* (a) *Competitive market.* Rates are presumed not to be excessive if a reasonable degree of price competition exists at the consumer level with respect to the class of business to which they apply. In determining whether a reasonable degree of price competition exists, the commissioner shall consider all relevant tests including:

1. The number of insurers actively engaged in the class of business;

2. The existence of rate differentials in that class of business;

3. Whether long-run profitability for insurers generally of the class of business is unreasonably high in relation to its riskiness.

(b) *Noncompetitive market.* If such competition does not exist, rates are excessive if they are likely to produce a long run profit that is unreasonably high in relation to the riskiness of the class of business, or if expenses are unreasonably high in relation to the services rendered.

(3) *Inadequacy.* Rates are inadequate if they are clearly insufficient, together with the investment income attributable to them, to sustain projected losses and expenses in the class of business to which they apply.

(4) *Unfair discrimination.* One rate is unfairly discriminatory in relation to another in the same class if it clearly fails to reflect equitably the differences in expected losses and expenses. Rates are not unfairly discriminatory because different premiums result for policyholders with like loss exposures but different expense factors, or like expense factors but different loss exposures, so long as the rates reflect the differences with reasonable accuracy. Rates are not unfairly discriminatory if they are averaged broadly among persons insured under a group, franchise or blanket policy.

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#### 625.12 Rating methods

In determining whether rates comply with the standards under s. 625.11, the following criteria shall be applied:

(1) *Basic factors in rates.* Due consideration shall be given to past and prospective loss and expense experience within and outside of this state, to catastrophe hazards and contingencies, to trends within and outside of this state, to loadings for levelling premium rates over time or for dividends or savings to be allowed or returned by insurers to their policyholders, members or subscribers, and to all other relevant factors, including the judgment of technical personnel.

(2) *Classification.* Risks may be classified in any reasonable way for the establishment of rates and minimum premiums, except that no classifications may be based on

race, color, creed or national origin, and classification in automobile insurance may not be based on physical condition or developmental disability as defined in s. 51.01 (5). Rates thus produced may be modified for individual risks in accordance with rating plans or schedules which establish reasonable standards for measuring probable variations in hazards, expenses, or both. Rates may also be modified for individual risks under s. 625.13 (2).

(3) *Expenses.* The expense provisions included in the rates to be used by an insurer may reflect the operating methods of the insurer and, so far as it is credible, its own expense experience.

(4) *Profits.* The rates may contain an allowance permitting a profit that is not unreasonable in relation to the riskiness of the class of business.

\* \* \* \* \*

#### 625.13 Filing of rates

(1) Except as provided in sub. (2), every authorized insurer and every rate service organization licensed under s. 625.31 which has been designated by any insurer for the filing of rates under s. 625.15 (2) shall file with the commissioner all rates and supplementary rate information and all changes and amendments thereof made by it for use in this state within 30 days after they become effective.

(2) *Consent to rate.* Upon written application of the insured, stating the insured's reasons therefor, filed with and not disapproved by the commissioner within 10 days after filing, a rate in excess of that provided by a filing otherwise applicable may be applied to any specific risk. The rate may be disapproved without a hearing, subject to s. 601.62 (3). If disapproved, the rate otherwise applicable applies from the effective date of the policy, but the insurer may cancel the policy pro rata on 10 days' notice to the policyholder. If the insurer does not cancel the policy the insurer shall refund any excess premium from the effective date of the policy.

\* \* \* \* \*



### 625.15 Delegation of rate making and rate filing obligation

(1) Rate making. An insurer may itself establish rates and supplementary rate information for any market segment based on the factors in s. 625.12, or it may use rates and supplementary rate information prepared by a rate service organization, with average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows.

(2) Rate filing. An insurer may discharge its obligation under s. 625.13 by giving notice to the commissioner that it uses rates and supplementary rate information prepared by a designated rate service organization, with such information about modifications thereof as is necessary fully to inform the commissioner. The insurer's rates and supplementary rate information shall be those filed from time to time by the rate service organization, including any amendments thereto as filed, subject, however, to the modifications filed by the insurer.

\* \* \* \* \*

### 625.22 Disapproval of rates

(1) Order in event of violation. If the commissioner finds after a hearing that a rate is not in compliance with s. 625.11, the commissioner shall order that its use be discontinued for any policy issued or renewed after a date specified in the order.

(2) Timing of order. The order under sub. (1) shall be issued within 30 days after the close of the hearing or within such reasonable time extension as the commissioner may fix.

(3) Approval of substituted rate. Within one year after the effective date of an order under sub. (1), no rate promulgated to replace a disapproved one may be used until it has been filed with the commissioner and not disapproved within 30 days thereafter.

(4) Interim rates. Whenever an insurer has no legally effective rates as a result of the commissioner's disapproval of rates or other act, the commissioner shall on request specify interim rates for the insurer that are high enough to protect the interests of all parties and may order that a specified portion of the premiums be placed in an escrow account approved by the commissioner. When new rates become legally effective, the commissioner shall order the escrowed funds or any overcharge in the interim rates to be distributed appropriately, except that refunds to policyholders that are *de minimis* shall not be required.

\* \* \* \* \*

### 625.23 Special restrictions on individual insurers

The commissioner may by order require that a particular insurer file any or all of its rates and supplementary rate information 15 days prior to their effective date, if and to the extent that he or she finds, after a hearing, that the protection of the interests of its insureds and the public in this state requires closer supervision of its rates because of the insurer's financial condition or rating practices. The commissioner may extend the waiting period for any filing for not to exceed 15 additional days by written notice to the insurer before the first 15-day period expires. A filing not disapproved before the expiration of the waiting period shall be deemed to meet the requirements of this chapter, subject to the possibility of subsequent disapproval under s. 625.22.

\* \* \* \* \*

### 625.31 Operation and control of rate service organizations

(1) License required. No rate service organization shall provide any service relating to the rates of any insurance subject to this chapter, and no insurer shall utilize the services of such organization for such purposes unless the organization has obtained a license under s. 625.32.



(2) Availability of services. No rate service organization shall refuse to supply any services for which it is licensed in this state to any insurer authorized to do business in this state and offering to pay the fair and usual compensation for the services.

\* \* \* \*

#### 625.32 Licensing

(1) Application. A rate service organization applying for a license as required by s. 625.31 shall include with its application:—

(a) A copy of its constitution, charter, articles of organization, agreement, association or incorporation, and a copy of its bylaws, plan of operation and any other rules or regulations governing the conduct of its business;

(b) A list of its members and subscribers;

(c) The name and address of one or more residents of this state upon whom notices, process affecting it or orders of the commissioner may be served;

(d) A statement showing its technical qualifications for acting in the capacity for which it seeks a license; and

(e) Any other relevant information and documents that the commissioner may require.

(2) Change of circumstances. Every organization which has applied for a license under sub. (1) shall thereafter promptly notify the commissioner of every material change in the facts or in the documents on which its application was based.

(3) Granting of license. If the commissioner finds that the applicant and the natural persons through whom it acts are competent, trustworthy, and technically qualified to provide the services proposed, and that all requirements of law are met, he or she shall issue a license specifying the authorized activity of the applicant. The commissioner may not issue a license if the proposed activity would tend to create a monopoly or to lessen or destroy price competition.

(4) Duration. Licenses issued pursuant to this section shall remain in effect until the licensee withdraws from the state or until the license is suspended or revoked.

(5) Amendments to constitution and bylaws. Any amendment to a document filed under sub. (1) (a) shall be filed at least 30 days before it becomes effective. Failure to comply with this subsection shall be a ground for revocation of the license granted under sub. (3).

\* \* \* \*

#### 625.34 Recording and reporting of experience

The commissioner shall promulgate or approve reasonable rules, including rules providing statistical plans, for use thereafter by all insurers in the recording and reporting of loss and expense experience, in order that the experience of such insurers may be made available to the commissioner. No insurer shall be required to record or report its experience on a classification basis inconsistent with its own rating system. The commissioner may designate one or more rate service organizations to assist the commissioner in gathering such experience and making compilations thereof, which shall be made available to the public.

\* \* \* \*

SUPREME COURT OF THE UNITED STATES

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No. 91-72

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

TICOR TITLE INSURANCE COMPANY, ET AL.

---

ORDER ALLOWING CERTIORARI

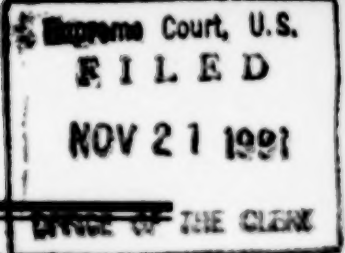
Filed October 7, 1991

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The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

October 7, 1991

6  
No. 91-72



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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

---

*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

---

**BRIEF FOR THE PETITIONER**

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### **QUESTIONS PRESENTED**

1. Whether private horizontal price-fixing is "actively supervised" by the State (for purposes of implied exemption from the federal antitrust laws) where prices are filed with a state agency but state officials do not determine whether the prices meet the State's regulatory criteria.
2. Whether the court of appeals properly deferred to the Federal Trade Commission's findings of fact.

### PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guarantee Company were respondents before the Federal Trade Commission and petitioners in the court of appeals. First American Title Insurance Company was a respondent before the Commission; it settled the charges against it by consent agreement.

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## In the Supreme Court of the United States

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 922 F.2d 1122. The opinion and final order of the Federal Trade Commission (Pet. App. 41a-136a), and the initial decision of the administrative law judge (Pet. App. 137a-250a), are reported at 112 F.T.C. 344.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 39a-40a. On June 2, 1991, Justice Souter extended the time for filing a petition for certiorari to and including July 10, 1991. The petition was filed on that date, and was granted on October 7, 1991.

(1)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a)(1), provides:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 5(c) of the FTC Act, 15 U.S.C. 45(c), provides, in pertinent part:

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. \* \* \* The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

#### STATEMENT

This case concerns horizontal price-fixing by respondents, five large title insurance companies. The ultimate issue is the meaning of the "active state supervision" requirement in the context of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

1. Respondents insure buyers of real property against losses due to certain defects in title. In 1982, respondents together accounted for 57% of the \$1.35 billion market for title insurance. Pet. App. 145a. Respondents charge their customers a relatively small fee for title insurance, and a relatively large fee for conducting a title search and examination. *Id.* at 180a. A title search is a compilation, in chronological order, of publicly recorded instruments in the chain of title to a parcel of real property. A title examination is an evaluation of the legal significance of those instruments. Title searches and title examinations are performed by private attorneys and commercial title abstract companies as well as by title insurance companies. See *Id.* at 147a-180a.<sup>1</sup>

Beginning in the 1960s, respondents organized "rating bureaus" in a number of States to set uniform prices for title search and examination services. Pet. App. 4a, 217a. The rating bureaus agreed on uniform rate schedules that were filed with state insurance departments. In the four States at issue in this case—Wisconsin, Montana, Arizona, and Connecticut—respondents' rates were effective unless disapproved by state insurance officials.<sup>2</sup> Although respondents' rates were not disapproved, state officials did not determine that the rates were consistent with the States' regulatory policies. (State insurance law generally requires that insurers' rates not be excessive, inadequate,

<sup>1</sup> This case concerns only respondents' collective setting of uniform rates for title search and examination services. The Commission did not challenge respondents' collective setting of insurance rates.

<sup>2</sup> In Wisconsin, rates do not have to be filed until 30 days after they take effect. Pet. App. 197a. In Montana, rates are effective upon filing with the state insurance department. *Id.* at 212a. In Arizona and Connecticut, insurers must wait for a prescribed period after filing rates (30 days in Connecticut, 15 days in Arizona) before using them. *Id.* at 190a, 201a.

or unfairly discriminatory. Pet. App. 97a, 190a, 202a, 212a.) The question in this case is whether respondents' price-fixing nevertheless met the legal criterion of being "actively supervised" by the States, and therefore is exempt from the federal antitrust laws, under the state action doctrine of *Parker v. Brown*, *supra*, and subsequent decisions of this Court.

2. In January 1985, the Commission issued an administrative complaint alleging that respondents had engaged in an unfair method of competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, by collectively setting rates for title search and examination services. The complaint listed 13 States as "[e]xamples of states in which \* \* \* Respondents have fixed prices." Pet. App. 45a (quoting Compl. para. 11). In their answer to the FTC's complaint, respondents argued, among other things, that their price-fixing took place pursuant to clearly articulated state policies and was actively supervised by the States at issue. Consequently, respondents argued, their price-fixing was exempt from the antitrust laws under the state action doctrine.

In December 1986, the administrative law judge issued a decision concluding that respondents' price-fixing, which plainly violated the FTC Act unless it was exempt from the federal antitrust laws, was exempt from the antitrust laws under the state action doctrine in some States, but not in others.<sup>3</sup> Pet. App. 137a-250a.

3. In September 1989, the Commission issued an opinion and final order prohibiting respondents from collectively setting and adhering to rates for search and examination services except "where such collective activity is

<sup>3</sup> The ALJ concluded that respondents' collective rate setting was actively supervised by Arizona and Montana, but not by Connecticut or Wisconsin. Pet. App. 241a-243a.

engaged in pursuant to a clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." Pet. App. 42a.

The Commission "h[e]ld that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." *Id.* at 55a. The Commission observed that the active supervision requirement ensures "that the [private] actor is engaging in the challenged conduct pursuant to state policy." Pet. App. 53a (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985)). Accordingly, the Commission stated, the active supervision requirement is satisfied only where state officials "have and exercise the power to review particular anticompetitive acts." Pet. App. 53a (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)). The Commission noted that "[t]he mere presence of some state involvement or monitoring does not suffice" to demonstrate active state supervision. Pet. App. 54a (quoting *Patrick*, 486 U.S. at 101). Thus, the Commission reasoned, "isolated instances of review" do not shield unreviewed private activity. Pet. App. 54a. Moreover, the Commission stated that "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." *Id.* at 55a (quoting *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 277 (1989)).

The Commission held that respondents' activities were not actively supervised in four States—Wisconsin, Montana, Connecticut, and Arizona.<sup>4</sup>

<sup>4</sup> The Commission also rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from Commission review under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), Pet. App. 78a-99a, and that respondents' price-fixing was protected under the *Noerr-Pennington* doctrine, *id.* at 99a-105a.



a. As to Wisconsin, the Commission concluded that respondents' uniform rates were "the product of private and not state action." Pet. App. 62a-63a. The Commission adopted the ALJ's findings that the State had "followed a 'hands-off policy in dealing with title insurers.'" *Id.* at 62a. Indeed, the Commission observed that in Wisconsin "no hearing has ever been held \* \* \* on *any* insurance rate filing, and no rate suspension order has ever been issued." *Id.* at 60a. The Commission noted that respondents' 1971 rate filing remained in effect for years, even though the supporting data necessary to determine whether the rates met the State's regulatory criteria were not filed with the State until 1978. *Id.* at 60a-61a. The Commission adopted the ALJ's finding that respondents' 1981 filing, which raised rates by 11%, was "allowed to go into effect (*i.e.*, not disapproved)" after state officials checked only the mathematical accuracy of the filing. *Id.* at 61a, 199a. Moreover, the "1982 filing was given a ' cursory reading ' " and the supporting materials "were not even checked for accuracy." *Id.* at 61a, 200a. In addition, the Commission found that "nearly two dozen endorsements and amendments went into effect without being examined at all." *Id.* at 63a.

b. As to Montana, the Commission found that "the record demonstrates that rates from [respondents'] 1983 filing went into effect without being examined." Pet. App. 76a. The Commission observed that a rating bureau representative met with state insurance officials and was told that, although the increase would go into effect immediately, additional supporting data would have to be filed with the insurance department. *Id.* at 74a. There was no evidence that respondents ever submitted the required supporting data. *Ibid.* The Commission rejected the argument that the active supervision requirement was satisfied by hearings "held three years before the formation of the

rating bureau" concerning "restrictive legislation designed to keep \* \* \* attorneys, real estate brokers, and lending institutions \* \* \* out of the title insurance business." *Id.* at 75a. The Commission agreed with complaint counsel that "such hearings cannot substitute for supervision of the price-fixing in question." *Id.* at 75a-76a. Similarly, the Commission concluded that Montana's enactment of legislation after respondents' price-fixing did not constitute active supervision of respondents' private anticompetitive activity. "Otherwise," the Commission observed, "states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute." *Id.* at 76a.

c. As to Arizona, the Commission adopted the ALJ's finding that there was "no convincing evidence that the [1968] rate was either justified by the [rating] bureau or reviewed by the state." Pet. App. 68a, 202a n.233. The Commission found that the insurance department never examined respondents' rating bureau at any time during the 13 years of its existence, despite a state statutory requirement that such examinations be conducted at least once every five years. *Id.* at 63a. The Commission also accepted the ALJ's findings that there is no evidence in the record that justifications were submitted for "minor rate adjustments \* \* \* filed throughout the period 1968 to 1980 \* \* \*, and the record is inconclusive as to the kind of review, if any, to which they were subject." *Id.* at 67a.

The Commission rejected respondents' argument that the active supervision requirement was satisfied by the State's involvement in respondents' attempt to raise escrow fees. State supervision of escrow fees is not state supervision of title search and examination fees, and "[a] state may not pick and choose which classifications of rates it is

going to supervise actively and which it will ignore.”<sup>5</sup> Pet. App. 68a.

d. As to Connecticut, the Commission accepted the ALJ’s finding that crucial aspects of respondents’ collective ratemaking activity “were not being supervised at all.” Pet. App. 56a. There was no showing that Connecticut officials examined respondents’ expenses, a factor that the state regulators themselves identified as crucial to determining whether respondents’ rates met the State’s regulatory criteria. Pet. App. 57a. Indeed, the Commission found that state officials believed that they lacked authority to regulate insurer expenses. *Id.* at 59a. The Commission explained that “when the state regulator responsible for implementing the statutory scheme admits a lack of significant control over the restraint in question, the rates are the product of private action.” *Ibid.*

In addition, the Commission found that Connecticut officials had “simply ignor[ed] some [rate] filings because they d[id] not involve generalized rate increases.” Pet. App. 60a. The Commission noted that “there is no *de minimis* exception to the antitrust laws for price-fixing.” *Ibid.* While the Commission recognized that sampling techniques might be sufficient to satisfy the active supervision requirement, mere “hit-and-miss review” was not sufficient. *Ibid.*<sup>6</sup>

<sup>5</sup> The Commission also rejected the argument that its claim was barred by principles of res judicata. An earlier action, *United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983), had challenged respondents’ collective setting of escrow fees. The Commission noted that respondents’ collective setting of title search and examination fees preceded their collective setting of escrow fees by about a decade. Pet. App. 71a.

<sup>6</sup> Commissioner Azcuenaga dissented in part. Pet. App. 111a-126a. She concluded that respondents’ collective ratemaking was actively supervised in Arizona and Connecticut, but not in Wisconsin and

4. The court of appeals reversed. Pet. App. 1a-38a. The court noted that respondents “do[ ] not dispute the FTC’s holding that the horizontal price-fixing agreements among five of the nation’s largest title insurance companies \* \* \* were anticompetitive and unfair within the meaning of § 5 of the FTC Act.” *Id.* at 2a. But the court of appeals held that respondents’ price-fixing activities were exempt under the state action doctrine.<sup>7</sup>

The court of appeals recognized that “[i]n the aftermath of *Patrick*, it is clear that the active supervision test requires that the state ‘have and exercise’ the power to review the particular anticompetitive acts.” Pet. App. 27a. The court noted that this Court has articulated four factors that are relevant to determining whether the active supervision requirement has been met: “(1) whether the state establishes the rates; (2) whether the state reviews the reasonableness of the rates; (3) whether the state monitors market conditions; and (4) whether the state ha[s] engaged in any ‘pointed reexamination’ of its program.” *Ibid.* (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980)).

Having recited the factors identified by this Court as relevant to active supervision, the court of appeals stated that “[w]e believe the First Circuit’s recent opinion in *New*

Montana. Commissioner Calvani agreed with the Commission’s resolution of the active supervision question, but disagreed with the Commission’s determination that Pennsylvania and New Jersey had not clearly articulated a policy allowing respondents to determine uniform rates. Pet. App. 109a-110a. The “clear articulation” issue is not before this Court.

<sup>7</sup> The court of appeals did not reach respondents’ additional arguments that their price-fixing was protected under the McCarran-Ferguson Act and the *Noerr-Pennington* doctrine. Pet. App. 38a n.17. None of those issues is before this Court.



*England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1990) ["NEMRB"], is most instructive on what type of showing is necessary to satisfy *Midcal's* active supervision prong." Pet. App. 27a. The court of appeals then adopted the following standard for determining whether a State actively supervises private anticompetitive activity:

Where \* \* \* the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

*Id.* at 28a (quoting *NEMRB*, 908 F.2d at 1071).

The court of appeals held that each of the four States at issue satisfied its version of the active supervision test.

a. As to Wisconsin, the court of appeals construed state law to "require[ ] Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory," and "to reject rates following a hearing if they do not meet the statutory criteria." Pet. App. 36a (citing Wis. Stat. Ann. §§ 625.11(1), 625.22 (West 1980)). The court further concluded that the officials' duty to review all rate filings was enforceable in a mandamus proceeding in state courts. Pet. App. 36a.

The court concluded that Wisconsin officials had "demonstrated some basic level of activity directed towards seeing that [respondents] carried out the state's policy." *Id.* at 36a-37a. The court did not question the Commission's finding that state officials had not determined whether respondents' rates were consistent with the

State's regulatory criteria. Instead, the court found it sufficient that "Wisconsin's Insurance Department raised questions regarding the 1971 filing" and "later ruled that it was acceptable."<sup>8</sup> The Insurance Department "checked the 1981 filing for accuracy." And the 1982 filing "also received some review from the Insurance Department." *Id.* at 37a.

b. As to Montana, the court concluded that state officials were required to assure that all rate bureau filings complied with state statutory requirements, and to reject rates that did not meet these criteria. Pet. App. 34a (citing Mont. Code Ann. §§ 33-1-311, 33-16-201, 33-16-203 to 33-16-206, 33-16-211 (1989)). Thus, the court reasoned, an action for a writ of mandamus would be available to compel insurance officials to determine whether a particular rate met the State's statutory criteria. Pet. App. 35a.

The court concluded that Montana's program of supervision was staffed and funded, and that state officials had demonstrated "some basic level of activity." Pet. App. 35a. Again, the court did not question the Commission's finding that Montana officials had not determined whether respondents' rates were consistent with the State's regulatory policies. Rather, the court held that it was sufficient that "someone from Tigor's rating bureau met with officials of Montana's Insurance Department," who "told Tigor's representative that the increase would go into effect immediately and approved the filing." *Ibid.* Although the state officials "requested additional supporting data," "[t]here is no evidence that [respondents] ever supplied

<sup>8</sup> As discussed below, note 16, *infra*, state officials may accept a rate schedule for filing because it complies with the State's requirements as to form and procedure. That type of "acceptance" or "approval" is not the same as approving the rates themselves as consistent with the State's substantive regulatory criteria. The court of appeals' opinion did not distinguish between these two different kinds of approval.



the supporting data," *id.* at 35a & n.16. The court nevertheless concluded that "the quantity of Montana's actions [was] sufficient to allow [respondents] to invoke the state action doctrine." *Id.* at 35a.

c. As to Arizona, the court noted the Commission's finding that respondents' "1968 filing went into effect essentially unreviewed," and that "Arizona's Insurance Department failed to undertake a formal examination of the rating bureau." Pet. App. 29a. But the court concluded that Arizona officials had the power to regulate respondents' price-fixing, because state law required the officials to determine that all rates filed with the department complied with the State's regulatory standards, and to reject any rates that did not meet the State's criteria. *Id.* at 30a (citing Arizona Rev. Stat. Ann. §§ 20-375(A), 20-376(D), 20-378(A) (1990)). In addition, the court found, Arizona had a regulatory program in place, staffed, and funded during the relevant period, and the state officials' duty to enforce the law was enforceable through mandamus proceedings in Arizona's state courts. Pet. App. 30a-31a.

The court also concluded that Arizona officials had engaged in "some basic level of activity." The court relied on testimony by an Arizona insurance official that every filing submitted from 1973 to 1982 was scrutinized to see if it met the State's statutory requirements. In addition, the court noted the ALJ's finding that no filing went into effect until it was marked "approved" by the director of the Insurance Department. Pet. App. 31a.

d. As to Connecticut, the court concluded that state officials had the power and duty "to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory," and to reject any rates that did not satisfy

these standards. Pet. App. 32a-33a (citing Conn. Gen. Stat. Ann. §§ 38-201p(b), 38-201x(a)(2), 38-201x(b)(2) (West 1987)). Connecticut's "program of supervision \* \* \* was staffed and funded" and "the duty to regulate" was enforceable through mandamus proceedings in Connecticut's state courts. Pet. App. 33a.

The court also concluded that Connecticut met its "basic level of activity" test. Pet. App. 33a. The court relied on testimony by a state insurance official that the State Insurance Department reviews every filing it receives. *Ibid.* And the court of appeals stated that state officials had approved respondents' rate filings in 1966, 1981, and 1983. *Ibid.* The court concluded that the "basis of the FTC's contrary holding" was its conclusion, explained in Commissioner Strenio's separate opinion, that respondents' commissions to their agents were excessively high. Pet. App. 33a-34a.

#### SUMMARY OF ARGUMENT

1. The court of appeals adopted an incorrect legal standard for determining when private anticompetitive conduct is "actively supervised" by the State. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court adopted a rigorous two-prong test for determining whether private conduct is exempt from the antitrust laws under the state action doctrine: the restraint on competition must be one that is both "clearly articulated and affirmatively expressed as state policy" and " 'actively supervised' by the State itself." 445 U.S. at 105. The state action exemption applies "only if the State effectively has made [the challenged] conduct its own"; accordingly, the active supervision test requires that state officials both "have and exercise power to review particular anticompetitive acts of private parties," and the

exemption is limited to "the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-101, 106 (1988).

The court of appeals adopted a watered-down version of the active supervision test, under which it is sufficient to show that the State's regulatory program is staffed, funded, and has demonstrated "some basic level of activity." Pet. App. 28a. The court of appeals' legal standard is inadequate because it provides no assurance that private anticompetitive activity is consistent with state policy.

In effect, the court of appeals' legal standard abandons the "active supervision" requirement, thus opening a gap in which private anticompetitive behavior that is not actively supervised by the State is nevertheless exempt from the federal antitrust laws. Principles of federalism do not require or justify such a result. Indeed, the court of appeals' standard actually restricts the States' regulatory choices, by raising the possibility that a relatively modest program of state regulation would have the drastic consequence of immunizing private anticompetitive conduct from the federal antitrust laws.

The court of appeals' application of its novel legal standard to the facts found by the Commission in Wisconsin and Montana illustrates its flaws. Under state law, respondents' rates were effective unless disapproved by state officials. Although state officials did not reject respondents' rates, the officials did not determine that the rates met the States' substantive regulatory criteria. Thus, there is no basis for concluding that respondents' anticompetitive price fixing was consistent with state policy.

The court of appeals also erred in relying on the assumed availability of mandamus proceedings in state courts as a basis for active supervision. In the States at

issue, insurance officials have discretion to determine whether a particular rate filing meets the State's regulatory criteria. Because mandamus is not available to compel an official to perform a discretionary function, it is not available in the circumstances of this case. In any event, the mere possibility of judicial review is not sufficient to meet the active supervision requirement. Aggrieved consumers may lack sufficient resources and incentive to bring suit. Moreover, anticompetitive conduct that is not consistent with the State's policies might well continue for months or years under a system that limited state supervision to *post hoc* litigation in state courts.

2. The court of appeals also failed to adhere to the statutory requirement that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). Rather than accepting the Commission's factual findings, the court of appeals made its own appraisal of the testimony. In Arizona, for example, the court disregarded the Commission's findings that there was no convincing evidence that respondents' major rate filing in 1968 was reviewed by the State, and that the record is inconclusive as to whether various minor rate adjustments received any review. Instead, the court of appeals relied on isolated pieces of evidence that do not warrant departure from the factual findings of the Commission. Similarly, the court disregarded the Commission's finding that crucial elements of respondents' rates in Connecticut were not supervised at all. Again, the court of appeals made its own appraisal of the testimony and substituted its own view of the evidence for that of the Commission. Under the Commission's findings, which should have been upheld, the "active state supervision" requirement was not met in Arizona or Connecticut.



## ARGUMENT

### I. THE "ACTIVE STATE SUPERVISION" TEST REQUIRES STATE OFFICIALS TO DETERMINE THAT PRIVATE ANTICOMPETITIVE ACTIVITY IS CONSISTENT WITH STATE POLICY

The basic question in this case is whether private price-fixing agreements are "actively supervised" for purposes of the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), absent a determination by state officials that the terms of the agreements are consistent with the State's policy. Our submission is that the state action doctrine, and the principles of federalism on which it is based, require such a determination.

#### A. "Active State Supervision" Is Required to Exempt Private Anticompetitive Conduct As Consistent With the State's Regulatory Policies.

In *Parker v. Brown*, *supra*, this Court held that the Sherman Act did not invalidate a California statute that authorized a state commission to impose price-enhancing restrictions on private raisin producers. Essential to the Court's decision in *Parker* was the fact that "it is the state, acting through the Commission, which adopts the program and which enforces it." 317 U.S. at 352. *Parker* was based on principles of federalism. As the Court observed (*id.* at 350-351): "In a dual system of government \* \* \* an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

This Court has rejected efforts to expand the state action exemption beyond the limits established by principles of federalism. See, e.g., *Community Communications Co.*

*v. City of Boulder*, 455 U.S. 40, 70 (1982) (Rehnquist, J., dissenting) (The "federal interest in protecting and fostering competition is not infringed" so long as "it is truly the government, and not the regulated private entities, which is replacing competition with regulation"). *Parker* expressly recognized that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351 (citing *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-347 (1904)). See also *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1353 (1991). This Court's subsequent decisions have recognized that the state action exemption does not apply to private conduct unless state officials determine that the particular private activity furthers, or at least is consistent with, the State's policies.

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*, the Court established a rigorous two-prong test for determining whether private anticompetitive activity is impliedly exempt from the antitrust laws under the state action doctrine: the exemption does not apply unless the challenged restraint is both "clearly articulated and affirmatively expressed as state policy," and "'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)). The Court held that the State did not actively supervise the wine pricing arrangement at issue in *Midcal* because the State did not establish prices, review the reasonableness of prices, monitor market conditions, or engage in any "pointed reexamination" of the program. 445 U.S. at 105-106. Instead, "[t]he State simply authorize[d] price setting and enforce[d] the prices established by private parties." *Id.* at 105. The Court held that this was "essen-



tially a private price-fixing arrangement" and therefore outside the exemption for state action, notwithstanding "a gauzy cloak of state involvement." *Id.* at 106.

The active supervision requirement is fundamental to proper confinement of the scope of the implied exemption recognized in *Parker v. Brown*. That exemption is based on reluctance to assume that the federal statutes broadly prohibiting anticompetitive commercial practices, even though comprehensively drafted, were meant to prohibit acts of the States themselves. Cf. *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). But that judicially implied exemption cannot properly be extended to allow the States merely to immunize private conduct from prohibitions enacted by Congress. It is not the province of the States to repeal the federal antitrust laws, industry by industry, and substitute authorization of privately imposed trade restraints.

This Court's decisions subsequent to *Midcal* have, if anything, further strengthened the active supervision requirement.<sup>9</sup> In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987), the Court held that state monitoring that does not exert "significant control" over the terms of a private restraint does not qualify as active supervision. Most recently, in *Patrick v. Burget*, 486 U.S. 94 (1988),

<sup>9</sup> In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), which concerned collective ratemaking by motor carriers, the Court noted that, under the regulatory scheme there at issue, "[a] proposed rate becomes effective if the state agency takes no action within a specified period of time," and that state agencies "have and exercise ultimate authority and control over all intrastate rates." *Id.* at 50-51. In that case, unlike this one, the government conceded that the state agencies actively supervised the private collective ratemaking. *Id.* at 62. Accordingly, only application of the "clear articulation" prong of the *Midcal* test was at issue in this Court. In *Southern Motor Carriers*, moreover, the regulatory commissions did in fact consistently require hearings. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979).

the Court explained in detail that *Parker's* exemption for "state action" shields private conduct from the antitrust laws only when "the State effectively has made [the] conduct its own." *Patrick v. Burget*, 486 U.S. at 106. The Court recognized that private parties must be presumed to be acting "to further [their] own interests, rather than the governmental interests of the State." *Patrick*, 486 U.S. at 100 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985)). The active supervision requirement "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." 486 U.S. at 101. Accordingly, the active supervision test "requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ibid.* (emphasis added).<sup>10</sup>

These governing principles apply in a straightforward way to the type of state regulatory scheme at issue in this case, under which private decisions take effect unless disapproved by state officials. This Court's decisions plainly indicate that mere failure to object to private activity is not sufficient to confer antitrust immunity.<sup>11</sup> "Active super-

<sup>10</sup> This Court's strict formulation of the active supervision requirement is reflected in the views of commentators that the essential inquiry is "whether the operative decisions about the challenged conduct [were] made by public authorities or by private parties themselves." 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213b, at 73 (1978); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668 (1991) (no state action exemption where persons controlling the terms of the restraints stand to profit from them).

<sup>11</sup> As leading commentators have observed, in the context of a regulatory scheme where "[t]ariff provisions \* \* \* take effect unless the [state] agency takes affirmative steps to suspend or disapprove them, \* \* \* [a]gency inaction is not sufficient to justify immunity." 1 P.

vision" means more than inaction or passive acquiescence. It requires an affirmative determination by state officials that the particular private anticompetitive activity at issue is consistent with State policy. *Patrick, supra*; *Midcal, supra*. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (no antitrust immunity conferred where a state passively accepted a public utility's tariff). Nothing less suffices to convert private anticompetitive conduct into action of the State itself, which is all that is impliedly exempt from the federal antitrust laws.<sup>12</sup>

Areeda & D. Turner, *Antitrust Law* ¶ 213f, at 77-78 (1978). "Inaction normally does not reflect any agency desire to approve," but instead reflects, at most, a choice by state officials to direct their limited enforcement resources into other areas. *Id.* at 78. Moreover, official inaction is insufficient to meet the active supervision requirement because it does not "assure conscious consideration by those particular state officials charged with the power and responsibility for approval." *Id.* at 78-79.

<sup>12</sup> In a "somewhat similar," although "by no means identical," context, *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 194 n.14 (1988), the Court has rejected the argument that inaction or mere acquiescence by the State converts private action into state action. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 354-357 (1974), the Court held that termination rules included in a utility's general tariff, but not scrutinized by the Public Utility Commission, were not state action for purposes of 42 U.S.C. 1983. The Court rejected the plaintiffs' argument that because the Public Utility Commission had the latent power to reject the disputed rules within the 60-day statutory notice period, the utility's termination of electrical service was transmuted into state action. The Court observed that "the sole connection of the [state agency] with [the] regulation was [the utility's] simple notice filing with the [Public Utility] Commission and the lack of any Commission action to prohibit it." 419 U.S. at 355. The Court concluded that this was not sufficient to convert the utility's action into state action for purposes of Section 1983. *Id.* at 357. See also *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible \* \* \* under the terms of the Fourteenth Amendment."); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978).

#### B. The Court of Appeals' Revision of the Active Supervision Test Would Shield Private Decisionmaking from the Antitrust Laws

The court of appeals adopted a reformulation of the active supervision test that would confer antitrust immunity on private parties if a State regulatory program is staffed, funded, confers on state officials "ample power and the duty to regulate pursuant to declared standards of state policy," is enforceable in the state courts, and "demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy." Pet. App. 28a. The court of appeals did not purport to derive its legal standard from any decision of this Court. Indeed, the court of appeals' test is incompatible with this Court's firm insistence that state officials actually exercise their power to determine whether private anticompetitive conduct is consistent with state policy. See *Patrick v. Burget*, 486 U.S. at 101.<sup>13</sup>

The principal defect in the court of appeals' legal standard is that it confers antitrust immunity even in the absence of a determination by state officials that the particular private anticompetitive activity at issue is consistent with state policy. When the State makes such a determina-

<sup>13</sup> Although the court of appeals purported to follow the decision of the First Circuit in *New England Motor Rate Bureau, Inc. (NEMRB) v. FTC, supra*, in fact the Third Circuit's decision goes considerably further than the First Circuit's decision in *NEMRB*. In *NEMRB*, the First Circuit concluded, on the basis of the parties' stipulation, that "the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute" and that "unreasonable rates [are] rejected" by state regulators. 908 F.2 at 1077. Based on that view of the stipulations, the result reached by the First Circuit — although not the legal standard that court adopted — was correct. Here, in contrast, there were no such stipulations or findings.



tion, *Parker* and its progeny teach that, under principles of federalism, the strong national policy in favor of competition gives way to the considered judgment of the State. But forms of state involvement or monitoring that do not rise to this level, if allowed to confer antitrust immunity, would shield anticompetitive conduct that the State has not determined to be desirable. To hold such private conduct immune from the federal antitrust laws would extend *Parker* beyond its federalism rationale.

The court of appeals' toothless legal standard effectively abandons the active supervision requirement, leaving in place only the companion requirement that the restraint be "clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. The resulting expansion of antitrust immunity would create a chasm in which private anticompetitive activities are constrained neither by the federal antitrust laws nor by the State. Moreover, the court of appeals' standard actually would limit the States' regulatory options, by raising the possibility that a relatively modest state regulatory program may have the drastic and unintended consequence of immunizing private anticompetitive conduct from the constraints of the antitrust laws. The court of appeals' standard thus undermines the very principles of federalism on which it purports to be based.

#### C. Application of the Court of Appeals' Standard Led to an Incorrect Result in Wisconsin and Montana

The court of appeals watered-down active supervision test led it to determine, incorrectly, that respondents' price-fixing activity was immune from the federal antitrust laws in Wisconsin and Montana.<sup>14</sup> In both States, the

<sup>14</sup> There can be no doubt that respondents' price-fixing activities violated Section 5 of the FTC Act unless those activities are somehow

Commission found (and the court of appeals did not purport to reject the Commission's factual findings) that state officials did not determine whether respondents' collective rates were consistent with the States' regulatory criteria. See Pet. App. 61a, 74a. The court of appeals nevertheless held that state officials had engaged in a sufficient "basic level of activity" to confer antitrust immunity on respondents' price-fixing. In Wisconsin, the court relied on evidence that state officials "raised questions" about the 1971 filing and "later ruled that it was acceptable." Pet. App. 37a.<sup>15</sup> The court also noted that Wisconsin officials "checked [respondents'] 1981 filing for accuracy" and gave the 1982 filing "some review." *Ibid.* In Montana, the court relied on evidence that respondents submitted a "five page single-spaced cover letter" in support of their 1983 filing, and that a state official met with respondents and requested additional information (which there is no evidence respondents ever supplied), but told them their rate would go into effect immediately. *Id.* at 35a.

Although state officials in Wisconsin and Montana asked questions about the filings, and approved the filings as to form, they did not determine that respondents' rates were consistent with the States' policies.<sup>16</sup> Indeed, the

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exempt from the federal antitrust laws. Private price-fixing agreements are *per se* unlawful. See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434 n.16 (1990) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1509, at 412-413 (1986)); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-697 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940). Indeed, no antitrust offense is more "dangerous to society." *Trial Lawyers Ass'n*, 493 U.S. at 434 n.16.

<sup>15</sup> In fact, the questions concerned only the geographic scope of respondents' uniform rates. Pet. App. 198a.

<sup>16</sup> The court of appeals stated that Wisconsin officials ruled that respondents' 1971 rate filing was "acceptable," Pet. App. 37a, and



Montana official's unanswered request for additional supporting data strongly supports the Commission's finding that Montana officials made no such determination. Because there is no basis for concluding that respondents' rates reflected anything other than their own desire to maximize profits, respondents' price-fixing was not exempt from the antitrust laws.<sup>17</sup>

that Montana officials "approved" respondents' 1983 filing. Here and elsewhere in its opinion, the court of appeals failed to recognize that state officials can "approve" a rate filing in at least two senses. First, state officials can approve a rate schedule for filing, on the basis of a determination that it meets the formal and procedural requirements for filing. Second, state officials can approve the rates themselves, on the basis of a determination that they are consistent with the State's substantive regulatory criteria. Although officials in Wisconsin and Montana "approved" respondents' filings in the first sense, that does not constitute or imply approval in the second sense—i.e., a determination that respondents' rates were consistent with state policy.

<sup>17</sup> The court of appeals stated that Wisconsin and Montana "satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors"—that is, Wisconsin "establishe[d] the rates" and "review[ed] the reasonableness of the rates." See Pet. App. 27a, 35a, 37a. In fact, however, it was respondents, not state officials, who established uniform rates through their rating bureaus. Moreover, the Commission found that state officials did not in fact review the reasonableness of the rates, and the court of appeals did not purport to overturn these findings. Thus, the court's conclusory statement that Wisconsin "satisfied the first two of the four *Midcal* \* \* \* factors" can only be read as holding, as a matter of law, that because the States met the "basic level of activity" test, they both "established" the rates and "reviewed the reasonableness of the rates." That plainly misreads this Court's decisions in *Midcal*, *324 Liquor*, and other cases.

**D. The Court of Appeals Erroneously Relied On the Asserted Availability Of Mandamus Proceedings In State Court As A Basis for Finding Active Supervision**

The court of appeals was also incorrect in concluding that Wisconsin and Montana grant private parties a right to seek a writ of mandamus from a state court, and in suggesting that such a means for compelling state officials to determine whether a particular rate meets the State's regulatory standards would be adequate to confer antitrust immunity. In this case, as in *Patrick v. Burget*, 486 U.S. at 104, the judicial review available to consumers, "if [it] exists at all, falls far short of satisfying the active supervision requirement." *Ibid.*

Mandamus is an extraordinary remedy; it is available only in the discretion of the court and is, in any event, not appropriate when the officer's duty requires the exercise of judgment and discretion. See *Jeppeson v. State Dep't of State Lands*, 205 Mont. 282, 288, 667 P.2d 428, 431 (1983) (mandamus "will not issue to compel performance of a discretionary function"); *Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714, 716 (1988) (mandamus is not appropriate "when the officer's duty is not clear and requires the exercise of judgment and discretion").

Wisconsin and Montana, joined by numerous other States, filed a brief in support of the petition for certiorari explaining that officials in those States have discretion to decide whether and to what extent to investigate a particular rate filing. See States' Br. 16-18. The statutory provisions cited by the court of appeals provide no support for its conclusion that state officials are required to determine whether every filed rate is consistent with the State's regulatory criteria. To the contrary, the state statutes support the States' argument that state officials have discre-

tion to decide whether to review particular rate filings.<sup>18</sup> Consequently, a state official's exercise of that discretion is not subject to judicial review in a proceeding for a writ of mandamus.

More fundamentally, we disagree with the court of appeals' suggestion that the mere availability of a state judicial remedy is sufficient to satisfy the requirement of active state supervision. See Elhauge, *supra*, 104 Harv. L. Rev. at 712-717. Judicial review is costly. Consumers may lack the financial resources necessary to detect abuses and bring a lawsuit to correct them. Even where consumers have the resources to pursue litigation, they may lack a sufficient incentive to do so. In many cases, the benefits of a successful lawsuit will be shared among many consumers, but the burden and expense of litigation will be borne by the few consumers who seek judicial review. In addition, judicial review occurs *ex post* rather than *ex*

<sup>18</sup> See Wis. Stat. Ann. § 625.11(1) (West 1980) ("Rates shall not be excessive, inadequate or unfairly discriminatory."); *id.* § 625.13 (insurers shall file all rates "within 30 days after they become effective"); *id.* § 625.22 ("If the commissioner finds after a hearing that a rate is not in compliance with § 625.11, the commissioner shall order that its use be discontinued"); Mont. Code Ann. § 33-1-311 (1989) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); *id.* § 33-16-201 ("Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.").

Although the States' brief confines its discussion to the law of Wisconsin and Montana, it appears that the laws of Arizona and Connecticut also give state officials discretion to review, or not to review, particular rate filings for compliance with the State's substantive criteria. See Ariz. Rev. Stat. Ann. § 20-365 (1990) ("The director *may* review . . . cooperative activities and practices") (emphasis added); Conn. Gen. Stat. Ann. § 38-201x(a)(2) (1987) ("A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner"). See also *id.* § 38-201p (granting Commissioner discretion to hold a hearing upon request of an aggrieved individual).

*ante*. As a result, an anticompetitive practice that will ultimately be found to be inconsistent with State policy may remain in effect for months or even years. Consequently, the mere availability of state judicial remedies is not sufficient to satisfy the active supervision requirement.<sup>19</sup>

## II. THE COURT OF APPEALS FAILED TO DEFER TO THE COMMISSION'S FINDINGS OF FACT

The court of appeals' error in departing from this Court's standard for active state supervision is compounded by its failure to accord proper deference to the Commission's findings of fact. The FTC Act provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). It is well settled that this provision "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)). Instead, "[t]he weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 739 (1945).

The court of appeals disregarded these principles in reviewing the Commission's factual findings as to Arizona and Connecticut. Although the court stated that it was "exercis[ing] plenary review" only "over the FTC's application of the state action doctrine to the facts" of this case, Pet. App. 12a, the court in fact relied on isolated bits of

<sup>19</sup> Whether judicial review that has actually occurred could suffice to satisfy the active supervision requirement is a question that is not presented here.



evidence rather than accepting the Commission's weighing of all the evidence and the credibility of witnesses.

**A. The Court of Appeals Disregarded the Commission's Findings With Respect To Arizona**

In overturning the Commission's determination that there had been no showing that Arizona actively supervised respondents' price fixing, the court of appeals did not expressly overturn any of the Commission's findings of fact. But the court nevertheless disregarded the Commission's findings that there was "no convincing evidence that [respondents' 1968] rate was \* \* \* reviewed by the state," Pet. App. 68a, that there was no evidence that various minor rate adjustments filed between 1968 and 1980 were justified, and that "the record is inconclusive as to the kind of review, if any" that the minor filings received. *Id.* at 67a. Instead, the court of appeals relied on three isolated pieces of evidence in the record, none of which justified rejection of the Commission's findings.

First, the court of appeals noted that, following respondents' 1968 rate filing, state officials "sought information as to how a component of the rates was derived." Pet. App. 31a. Although that is correct, it does not follow that state officials determined that respondents' rates were consistent with the State's substantive criteria. In fact, the State's inquiry did not relate to title search and examination fees at all, but instead concerned the insurance component of respondents' fees. See Pet. App. 202a-203a n.233.

Second, the court of appeals relied on testimony by an Arizona insurance official that "every filing submitted from 1973 to 1982 'was examined to see if it met the [State's] statutory requirements.'" Pet. App. 31a. That testimony, even standing alone, does not require an in-

ference that state officials reviewed the merits of respondents' 1968 filing. Moreover, the Commission was entitled to weigh the official's testimony against other evidence in the record, including the same official's subsequent testimony that "no review was conducted between 1973 and 1982," and that he "could not recall any specific department review of various amendments." *Id.* at 66a.

Third, the court of appeals relied on the ALJ's finding that "no filing went into effect in Arizona until the director of the Insurance Department marked the filing 'approved.'" Pet. App. 31a. As we have noted, see note 16, *supra*, a state official may "approve" a rate schedule for filing (*i.e.*, determine that a rate schedule meets the formal requirements for filing) without approving the rates themselves (*i.e.*, determining that the rates are consistent with the State's substantive criteria). Here, the Commission found that state officials had not approved ~~of~~ respondents' rates in the second sense. The court of appeals was not entitled to disregard that finding on the basis of an ambiguous statement in the ALJ's initial decision.

**B. The Court of Appeals Disregarded the Commission's Findings With Respect To Connecticut**

The court of appeals also failed to accord sufficient deference to the Commission's factual findings with respect to Connecticut. The Commission found that crucial elements of respondents' rates "were not being supervised at all," and that state officials "simply ignor[ed] some [rate] filings because they [did] not involve generalized rate increases." Pet. App. 56a, 60a. Again, the court of appeals did not expressly reject any of the Commission's findings as unsupported by the evidence. But the court of appeals nevertheless relied on testimony by a state official that Connecticut reviews every rate it receives. Pet.



App. 33a. Again, the Commission was entitled to weigh this testimony against other evidence in the record, including evidence that state officials did not supervise insurer expenses, a key component of respondents' uniform rates, at all.

The court also stated that Connecticut officials had approved respondents' rate filings in 1966, 1981, and 1983. Pet. App. 33a. Again, the court of appeals overlooked the distinction between approval of rate schedules for filing and approval of the rates themselves as consistent with the State's substantive criteria. The Commission's ~~determina-~~  
~~tion~~ finding that state officials did not make the second determination is supported by evidence that state officials did not supervise a key component of respondents' rates that was necessary to determine whether they met the State's regulatory standards, see *id.* at 59a, as well as by evidence that state officials never received the information they requested in support of respondents' 1966 filing, *ibid.*, and "approved" respondents' 1983 filing "even though [respondents] had yet to supply supporting data." *Id.* at 33a.

Finally, the court of appeals stated that the "basis" for the Commission's decision, as explained by Commissioner Strenio's separate opinion, was that Connecticut did not "meaningfully" supervise respondents' price-fixing because the FTC concluded that respondents paid excessive commissions to their agents. Pet. App. 33a-34a. Of course, statements in separate opinions are not statements of the Commission. And the statement in the Commission's opinion that Connecticut "regulators could not meaningfully regulate a critical component of the ratemaking process" refers to the Commission's finding that Connecticut officials "lacked the authority to control insurer expenses" as an element of ratemaking. Pet. App. 59a. Thus,

the Commission merely applied the principle that the active supervision requirement is not met where state officials do not "exer[t] any significant control over" the terms of the restraint. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1987).

In sum, the court of appeals' selective treatment of the record is contrary to the statutory requirement that the Commission's findings are conclusive if supported by evidence. Under the Commission's findings, which reflected a proper evaluation of the entire record and therefore should have been upheld, the "active state supervision" requirement was not met in Arizona or Connecticut.

#### CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 1991

**BEST AVAILABLE COPY**

### QUESTION PRESENTED

Whether joint rate filings by title insurance rating bureaus, authorized by state law, were "actively supervised" for purposes of the state action doctrine where (1) the state insurance departments had plenary power to review and disapprove the rates, (2) state laws granted the regulators the power and duty to regulate pursuant to standards that were enforceable in the state courts, (2) programs of supervision by state regulators were in place, staffed and funded, and (4) the regulators demonstrated a basic level of activity in carrying out the policies of the States, including reviewing the reasonableness of the filed rates.



# **RULE 29.1 LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES**

The Rule 29.1 listing of parent companies, subsidiaries and affiliates is included in Respondents' Brief in Opposition to the Petition for Certiorari and remains current, except as follows:

Respondent Lawyers Title Insurance Corporation is now a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary or affiliate of Lawyers Title Insurance Corporation has publicly traded common stock.

The list of non-wholly-owned subsidiaries and affiliates of respondent Stewart Title Guaranty Company included in the Appendix to Respondents' Brief in Opposition to the Petition for Certiorari is amended to reflect the additions and deletions listed in the Appendix hereto.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

\_\_\_\_\_  
 No. 91-72  
 \_\_\_\_\_

FEDERAL TRADE COMMISSION,

v.

*Petitioner,*

TICOR TITLE INSURANCE COMPANY, *et al.*,

*Respondents.*

\_\_\_\_\_  
**On Writ of Certiorari to the  
 United States Court of Appeals  
 for the Third Circuit**  
 \_\_\_\_\_

**BRIEF FOR THE RESPONDENTS**

**STATEMENT OF THE CASE**

This Court must determine in this case whether the state action doctrine of federal antitrust law requires an antitrust court to conduct an intrusive, qualitative assessment of state economic regulation. In the decision below, the United States Court of Appeals for the Third Circuit reversed an order of the Federal Trade Commission, which had held that the Respondents violated the federal antitrust laws by participating in state-licensed rating bureaus that filed rates with state insurance regulators. *Ticor Title Ins. Co. v. F.T.C.*, 922 F.2d 1122 (3d Cir. 1991) (Pet. App. 1a-40a), *cert. granted*, 112 S.Ct. 47 (1991). The Court of Appeals held that the regulatory program existing in each State constituted "active supervision" under the standard enunciated by this Court in

*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*").<sup>1</sup>

### 1. History Of This Proceeding.

The Third Circuit determined, with respect to the four States in which application of the state action doctrine depended on satisfying the active supervision requirement,<sup>2</sup> that the standard applied by the Federal Trade Commission ("FTC" or "Commission") "would, in effect, try the state regulator." (Pet. App. 32a.) It held that the "principles of federalism and state sovereignty that undergird the [state action] doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable." (Pet. App. 37a.) The Third Circuit held that, as articulated by this Court, active supervision requires only that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." (Pet. App. 26a, quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("*Patrick*").).

Applying this principle, the Third Circuit employed the test used by the First Circuit in reviewing another of the

<sup>1</sup> In *Midcal*, this Court held that acts of private persons are within the protection of the state action doctrine if the actions are taken pursuant to "clearly articulated and affirmatively expressed state policy," and are "actively supervised" by the State. 445 U.S. at 105.

<sup>2</sup> Arizona, Connecticut, Montana and Wisconsin. In two other States (New Jersey and Pennsylvania) the Commission had held that the "clearly articulated state policy" requirement of *Midcal* was not satisfied because the state insurance regulators had exceeded the scope of their regulatory authority under state law. (Pet. App. 149a-52a.) However, in light of the intent of those States to broadly regulate title insurers and the consistent construction of state law by the state agencies charged with its enforcement, the Third Circuit reversed the Commission and found the state regulators' interpretations of their own laws "worthy of our deference." (Pet. App. 20a.) The Commission does not challenge this holding before this Court.

FTC's rating bureau cases: does the state agency have "the authority to 'review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,'" and does the agency "review[] the reasonableness of the [filed] rates." (Pet. App. 28a, quoting *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) ("*New England*").). Concurring with the First Circuit that the FTC was "too demanding in the showing it would require as to the rigor and efficiency of a particular state's regulatory program," *id.*, the Third Circuit held that a State had exercised its regulatory powers where the following could be shown:

Where . . . the state's program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

(Pet. App. 28a, quoting *New England*, 908 F.2d at 1071).

The Third Circuit concluded that the active supervision requirement was satisfied in each State. Regulators in Arizona, Connecticut, Montana and Wisconsin had authority to review and to disapprove filed rates. The Third Circuit also concluded that regulators in each of these States had exercised their power to control collective rate filing by reviewing the reasonableness of the filed rates under state statutory criteria. Each of the States granted to its insurance department ample power and the duty to regulate pursuant to declared standards of state policy, a duty enforceable in the States' courts. In each of the four States there was a program of supervision in place which was staffed and funded. Finally, in each of the States the insurance department had demonstrated some basic level of activity directed toward seeing that "the private actors carry out the State's policy and not simply their own policy." (Pet. App. 29a-38a.)

## 2. The Record Of State Supervision.

To evaluate the Commission's argument that the State programs at issue here failed to satisfy the active supervision requirement, it is necessary to consider the nature of the programs. This section addresses these programs, first, according to their statutory requirements, and second, according to the actual activity of the state agencies.

### a. Statutory Scheme Of Regulation.<sup>3</sup>

Each of the States at issue required title insurers to file title insurance rates, including rates for search and examination services, with the state insurance department.<sup>4</sup> Each State permitted these rates to be filed by an individual insurer or by a state licensed rating bureau.<sup>5</sup> The statutes of each State included detailed provisions pertaining to the organization and licensing of title insurance rating bureaus.<sup>6</sup> Each insurance department had the authority to revoke or to suspend the license of a rating bureau.<sup>7</sup>

<sup>3</sup> This discussion focuses upon only the key components of the rate regulatory statutes applicable to title insurers in these four States during the relevant time period. State statutory provisions that are particularly relevant are reproduced in the Joint Appendix ("J.A.") at 166-211. Statutory provisions made part of the administrative record below are incorporated in the single joint hearing exhibit (*see* FTC Docket Sheet at 18).

<sup>4</sup> Ariz. Rev. Stat. Ann. § 20-376(A) (J.A. 168); Conn. Gen. Stat. Ann. § 38-201x (J.A. 183-84); Mont. Code Ann. § 33-16-203 (J.A. 195); Wis. Stat. Ann. § 625.13(1) (J.A. 207).

<sup>5</sup> Ariz. Rev. Stat. Ann. § 20-376(B) (J.A. 168); Conn. Gen. Stat. Ann. § 38-201d (J.A. 174); Mont. Code Ann. § 33-16-203 (J.A. 195); Wis. Stat. Ann. § 625.13(1) (J.A. 207).

<sup>6</sup> Ariz. Rev. Stat. Ann. §§ 20-361, 20-376(B) (J.A. 168); Conn. Gen. Stat. Ann. §§ 38-201d, 38-201j (J.A. 174); Mont. Code Ann. § 33-16-401 to 33-16-403 (J.A. 198-201); Wis. Stat. Ann. §§ 625.31-625.34 (J.A. 209-11).

<sup>7</sup> Ariz. Rev. Stat. Ann. § 20-374; Conn. Gen. Stat. Ann. § 38-201p(d) (J.A. 179-81); Mont. Code Ann. §§ 33-16-111, 33-16-112 (J.A. 192-93); Wis. Stat. Ann. § 625.32(4) (J.A. 211).

In each of the four States, rates were required to be not "excessive, inadequate or unfairly discriminatory."<sup>8</sup> By statute, proposed rates were effective (immediately or within a specified period) if the state agency took no affirmative action to challenge them.<sup>9</sup> The departments were required generally to enforce the provisions of the codes, and specifically to disapprove or rescind any proposed or effective rate which did not comport with the rate criteria.<sup>10</sup> Persons aggrieved by any rate filing were provided with specific statutory rights to require the regulator to hold a hearing or otherwise review the filing to determine that it comported with the rate criteria.<sup>11</sup>

Detailed statutory provisions explained the meaning of the statutory rate criteria.<sup>12</sup> In each State, the insurance department was authorized to develop statistical plans for the reporting of loss and expense experience, and to obtain the assistance of the rating bureau in collecting data on revenues and costs in order to assist the regulator in reviewing title insurance rates.<sup>13</sup> Each State's

<sup>8</sup> Ariz. Rev. Stat. Ann. §§ 20-375(A), 20-376(D) (J.A. 167-68); Conn. Gen. Stat. Ann. § 38-201x(b)(2) (J.A. 186); Mont. Code Ann. §§ 33-16-201 (J.A. 193-94); Wis. Stat. Ann. § 625.11 (J.A. 205-06).

<sup>9</sup> Ariz. Rev. Stat. Ann. 20-376(E) (J.A. 168); Conn. Gen. Stat. Ann. § 38-201x(a)(2) (J.A. 184); Mont. Code Ann. § 33-16-203 (J.A. 195); Wis. Stat. Ann. § 625.13 (J.A. 207).

<sup>10</sup> Ariz. Rev. Stat. Ann. §§ 20-375(A), 20-376(D) (J.A. 167-68); Conn. Gen. Stat. Ann. §§ 38-4, 38-201p(b), 38-201x(b)(2) (J.A. 171, 178, 186); Mont. Code Ann. §§ 33-1-311, 33-16-205 (J.A. 188, 196); Wis. Stat. Ann. §§ 601.41(1), 625.22 (J.A. 201, 208).

<sup>11</sup> Ariz. Rev. Stat. Ann. § 20-378(B) (J.A. 170-71); Conn. Gen. Stat. Ann. § 38-201p(a), (b) (J.A. 177-78); Mont. Code Ann. §§ 33-16-204, 33-16-205 (J.A. 196-97); Wis. Stat. Ann. § 227.42(1).

<sup>12</sup> Ariz. Rev. Stat. Ann. § 20-375 (J.A. 167); Conn. Gen. Stat. Ann. § 38-201c (J.A. 172-73); Mont. Code Ann. § 33-16-201 (J.A. 193-94); Wis. Stat. Ann. §§ 625.11, 625.12 (J.A. 205-07).

<sup>13</sup> Ariz. Rev. Stat. Ann. § 20-371; Conn. Gen. Stat. Ann. § 38-201m(b) (J.A. 174-75); Mont. Code Ann. § 33-16-202 (J.A. 194-95); Wis. Stat. Ann. § 625.34 (J.A. 211).



statutory regime also provided standards and procedures for the filing of rates and rate justifications by rating bureaus.<sup>14</sup>

**b. Administrative Record Of Supervision.**

The following description of the state regulatory history is based on the findings of the Administrative Law Judge ("ALJ") adopted by the Commission, as well as the uncontradicted record evidence.<sup>15</sup> Beginning as early as 1965 until the FTC complaint was filed in January 1985, Respondents and other title insurers elected the option afforded by state statutes to make required rate filings through state licensed rating bureaus in Arizona, Connecticut, Montana and Wisconsin. (Pet. App. 217a.)

(1) **Arizona.** The initial rate filing of the Arizona rating bureau in 1968 was based upon an existing, competitively-determined rate structure, a type of filing expressly approved by state law. That filing was in effect for fifteen years until the bureau ceased to exist. During that period, the rate bureau also filed various forms and endorsements.

The bureau was founded in 1968 and made its first rate filing that year, pursuant to a new statute that for the first time required title insurance rates to be filed with the insurance department pursuant to regulatory criteria requiring that rates not be excessive, inadequate

<sup>14</sup> Ariz. Rev. Stat. Ann. §§ 20-376, 20-377 (J.A. 168-70); Conn. Gen. Stat. Ann. § 38-201x (J.A. 183-88); Mont. Code Ann. § 33-16-203 (J.A. 183-88); Wis. Stat. Ann. § 625.13 (J.A. 207).

<sup>15</sup> In the following discussion, references to evidence in the FTC administrative record are made as follows: Testimony of witnesses at the administrative hearing is cited by the name of the witness and the page of the hearing transcript at which the testimony may be found (*e.g.* Wilkie 2071). Commission exhibits and respondents' exhibits admitted to the administrative record are cited by their prefix, exhibit number and page according to the numbering system used in the administrative hearing (*e.g.* CX 8, RX 502S). The page number of the Joint Appendix is also included for testimony or exhibits reproduced there (*e.g.* J.A. 47-50).

or unfairly discriminatory. Ariz. Rev. Stat. Ann. § 20-375(A) (J.A. 167). The rate regulation law grew out of concern over the solvency and stability of title insurers after the failure of two Arizona title insurance firms in the middle 1960's. (Wilkie 2071, J.A. 29.) The ALJ found that the rate structure proposed in the 1968 filing adopted, with slight modifications, pre-rating bureau competitive industry rates. (Pet. App. 202a n.233; accord Wilkie 2074-75, J.A. 30-31.) These rates were supported by express statutory language permitting rates to be justified for conformance with the state regulatory criteria on the basis of the actual experience of any title insurer or rating organization. Ariz. Rev. Stat. Ann. § 20-377 (J.A. 169-70).

The 1968 rate filing was accepted by the department without further inquiry to the bureau. (CX 8; RX 60A, J.A. 102-03.) The bureau then began to collect information concerning industry profitability which it could use to demonstrate to the department on a regular basis that the rates were not excessive, inadequate or unfairly discriminatory, and therefore conformed to the statutory criteria. Contacts were made with experts familiar with title insurance rate regulation in other States, and a rate justification committee of the bureau compiled income and expense statistics from most of the Arizona title insurance industry for the years 1966-70. (Wilkie 2077-79, J.A. 32-33; RX 60A, J.A. 102-03.)

In 1971, the department convened a hearing to consider, among other matters, "[t]he basis upon which rates and fees currently charged the public . . . are fixed; and . . . [t]he rating material currently on file with the Department." (RX 72, J.A. 106.) At the hearing, the bureau submitted to the department its collected data concerning industry profitability for the period from 1966 to 1970. (Wilkie 2082-83, J.A. 34-35.)

Beginning in 1971, the bureau hired the accounting firm of Ernst & Ernst to collect income and expense in-

formation. Through 1977, Ernst & Ernst collected information on a yearly basis that was retained by the bureau to support the reasonableness of the rate structure. (*Wilkie* 2078-79, J.A. 32-34.) The bureau president testified that "[w]e felt that we should have [the information] available in the event [it was] required by the department or, in the event that we deemed that we wanted to go in and have a rate hearing." (*Wilkie* 2080, J.A. 34.)

In 1977, the bureau filed rates for escrow services pursuant to a statutory amendment which brought such fees within the regulatory structure. Department officials warned the bureau that it "would have to be in a position to substantiate [any escrow fee] filing" and that the appropriateness of the level of escrow rates would be judged by the department in light of the existing title insurance rates. (*Wilkie* 2092-93, J.A. 35-36.) The escrow rates submitted by the bureau continued the approximate historical rate of return, and "were basically no change from that generally being charged by the industry at that time." (*Id.* 2095-96, J.A. 37-38.) In recognition of the short time period within which the new rates were required by statute to be filed, the department accepted the filed rates, conditioned upon proof that the bureau had retained Arthur D. Little, Inc. ("A.D. Little") to develop a program to collect further information to support the reasonableness of the rate structure. (*Wilkie* 2095, J.A. 38.)

A.D. Little developed financial and statistical reporting plans to assess the overall profitability of the Arizona title insurance industry.<sup>16</sup> (*Plotkin* 2406, 2473-75, 2483-

<sup>16</sup> A.D. Little, the economic consulting firm (*see Plotkin* 2377, J.A. 60-61), created a data collection and reporting system which was used by regulators in more than seventeen States (*Plotkin* 2490, J.A. 64), including Arizona, Connecticut, and Wisconsin. Its system included a financial or income and expense reporting plan to provide the state regulator a method for determining the overall rate of return achieved by the title insurance industry in a par-

85, J.A. 61-64.) Dr. Plotkin of A.D. Little testified that the development of the plans in Arizona involved an interactive process with the department, in which the director himself was involved. (*Id.* 2611, 2624, J.A. 67, 71.) Beginning in 1978, A.D. Little prepared and submitted annual reports examining the profitability of the Arizona title insurance industry, which included data for the years from 1972 to 1980. (RX 88; RX 91; RX 92; RX 493.) The A.D. Little reports showed the rates in these years were not excessive or inadequate. (*Plotkin* 2610, 2619-20, J.A. 67-70.)

In November 1980, the department decided to conduct an examination of the bureau by an outside consultant, at the bureau's expense, focusing on rates, rate-making procedures, competition, and the A.D. Little methodology for measuring profitability. (RX 93-93B, J.A. 108-11.) The examination was conducted by the actuarial firm of Tillinghast, Nelson & Warren, which was chosen by the department. The Tillinghast examination included review of the A.D. Little plans and results, a general critique of the bureau ratemaking procedures and the background and nature of title insurance generally. (*Bethel* 1910-11, 1974-76, J.A. 23-26.)

ticular State, which could be compared with other States and industries. (*Plotkin* 2473-83, J.A. 61-63.) The system also included a separate statistical plan to assist the regulators in assessing the impact of a rate structure upon different classes of consumers; *viz.*, whether the rate is not discriminatory. (*Plotkin* 2483-88, J.A. 63-64.)

The A.D. Little financial reporting plan was intended to assess the profitability of title insurers under the overall rate structure, not to cost-justify particular segments of the rates. In A.D. Little's view, the nature of the title insurance business and rate structures would make any attempt to cost-justify particular segments of the rates "extremely arbitrary." (CX 91Z-103, J.A. 101.) Among the factors cited for this view were the small loss ratio in title insurance, the high proportion of fixed costs, and the fact that title insurance rate structures "reflect primarily legislative and regulatory social policies, historical practice, and the realities of the product market." *Id.*



The Tillinghast report, completed in 1982, endorsed the A.D. Little reports and agreed with the A.D. Little conclusion that the bureau rates from 1972-80 were not excessive, though it suggested that by the time of the 1981 real estate recession the rates might have been inadequate. (RX 96-96H; RX 96J; *Bethel* 1975, J.A. 26.) The witnesses familiar with the department's policies uniformly testified that if the rates had been shown to be excessive, the department would have acted promptly to rectify the situation. (*E.g. Bethel* 1981-82, J.A. 27-28; *Barberich* 2261-62, J.A. 52-53.)

Between 1968 and 1980 the bureau filed a number of what the FTC found to be "minor" rate amendments, adjustments and endorsements. (Pet. App. 67a.) Department employees in charge of reviewing rate filings since 1973 testified that department policy was to review every filing for conformance to the statutory criteria and seek supporting information if it was deemed necessary. (*Barberich* 2230-34, J.A. 47-50; *Williamson* 2190, J.A. 43-44.) The FTC found that the record was "inconclusive" as to the review that these filings actually received. (Pet. App. 67a.)

Members began to withdraw from the bureau following entry of judgment in December 1981 in an antitrust suit brought by the United States Department of Justice challenging the bureau's filing of collective rates for escrow services. (Pet. App. 205a; *Wilkie* 2102, J.A. 39; *Plotkin* 2621-22, J.A. 70-71.) The bureau's corporate charter was revoked in 1983. (Pet. App. 205a.)

(2) **Connecticut.** The Connecticut rating bureau made two general rate filings, in 1966 and 1981. In addition, the bureau filed numerous amendments and endorsements from 1966 to 1983.

The ALJ found that in response to the 1966 filing, the department sought additional justification from the bureau. (Pet. App. 191a; RX 104, J.A. 112-13.) After soliciting the assistance of its members to gather the

requested information (RX 105, J.A. 114-15), the bureau withdrew its original filing (RX 106, J.A. 117), and submitted, in response to the department's inquiry, a new filing that included a proposed rate manual, proposed policy forms, and a memorandum explaining and supporting the revised filing (RX 107-107a, J.A. 118-19). Upon requesting additional information concerning the revised filing (RX 108, J.A. 120), the department acknowledged receipt of the filing and additional correspondence (RX 110, J.A. 124). According to the ALJ, the department then "approved the bureau's rate, effective August 15, 1966," (Pet. App. 191a; RX 110, J.A. 124), although the ALJ determined that there was no evidence that the request for justification was ever answered "satisfactorily," (Pet. App. 191a).

On December 3, 1981, the bureau filed its only other major rate filing. (Pet. App. 192a.) Prior to this filing, department and bureau representatives met to review the perceived need for the increase and to determine what information would be necessary to support it. (*Ferraro* 2311-13, J.A. 58; *DiSanto* 2737, J.A. 75.) The department discussed with the bureau the level of agents' commissions in Connecticut (*DiSanto* 2737-41, J.A. 75-77), which the department had no authority to regulate directly, (*DiSanto* 2739-41). "[D]iscussion centered around alternatives . . . as to what steps could be taken to effectively bring forth a reduction in [agent] commission[s], as a means of lowering the cost of title insurance [to] the consumer." (*DiSanto* 2788.)<sup>17</sup> Follow-

<sup>17</sup> The subject of agents' commissions had been discussed by the Department with representatives of the title insurance industry in prior occasions. (*DiSanto* 2739, J.A. 76) (the agency commission issue "has been kind of a constant item for discussion when I meet with or when I had met with title insurance people, the rating organization member representatives"); (*DiSanto* 2756, J.A. 79). See also RX 114-114A (J.A. 125-26) (discussing the department's indication that it might seek to limit amount of commissions paid to agents).



ing these discussions the department determined that the level of commissions paid to agents was not the result of actions by the bureau or its members, but rather was controlled by the competitive market for agents, which was unregulated, and in which title insurers competed to obtain business. (*See, e.g., DiSanto 2798-2800.*)

The department closely scrutinized the bureau rate filing. It required the bureau to file substantial supporting information with the requested rate increase. (*Ferraro 2314, J.A. 59.*) The bureau complied. (CX 30A to 30Z-97.) The filing included an explanatory letter (CX 30A-30B, J.A. 91-93), a lengthy A.D. Little profitability analysis (Pet. App. 192a; CX 30C to 30Z-79; RX 499; *Plotkin 2629*), the bureau's calculation of its projected rate of return based on the proposed rate increase (CX 30Z-80 to 30Z-81), and a marked-up rate manual reflecting the proposed increase in rates. (CX 30Z-82 to 30Z-97.)

The responsible Connecticut regulators reviewed all of the materials submitted by the bureau in support of its 1981 filing, described by one of them as "well supported and detailed." (*DiSanto 2742, J.A. 77.*) They discussed the filing, compared the rates proposed to previous filings and ultimately concluded that the filing satisfied statutory requirements. (*DiSanto 2743-47, J.A. 77-79; Bell 2827-29, J.A. 83-84.*) The department approved the filing. (Pet. App. 195a.)

In addition to these two comprehensive filings, the bureau filed amendments and endorsements from 1966 to 1983. As to these, the ALJ found that "apparently some were carefully reviewed while others were approved with minimal review; there was no showing, however, in the record that even this minimal review was inadequate considering the subject matter of these minor ancillary filings." (Pet. App. 191a, n.192.) The regulator testified that the department "reviews every filing that we receive" (*DiSanto 2758, J.A. 80*), and the uncon-

tradicted evidence demonstrates that at least three of the endorsement filings were revised, withdrawn or disapproved after state insurance officials questioned certain features of those filings. (*DiSanto 2759-69.*)

All Respondents had withdrawn from the Connecticut bureau by the beginning of 1985, and the bureau ceased functioning in the first quarter of that year. (Pet. App. 195a, 217a; *DiSanto 2728.*)

(3) **Montana.** The Montana rating bureau obtained its license in July 1982, (CX 37), but was defunct by 1985. (Pet. App. 217a.) It made filings in February 1983 (CX 41A-41E, J.A. 94-99), and October 1984 (CX 43A to 43Z-25).

In the years preceding the formation of the rating bureau, the Montana insurance commissioner had become particularly involved with title insurance rating and profitability issues by virtue of his participation in a national task force which studied these issues.<sup>18</sup> The Montana insurance department also held a hearing in 1979 to consider the impact, if any, on title insurance rates of the "controlled business" phenomenon in the industry. (RX 492N; *Plotkin 2714-17, J.A. 73.*) Dr. Plotkin of A.D. Little testified at this hearing, which entailed scrutiny of the profitability of title insurers. (*Plotkin 2717, J.A. 73.*)

<sup>18</sup> The insurance commissioner had been involved in a task force created by the National Association of Insurance Commissioners ("NAIC"). (RX 502Z-44—502Z-50; RX 502Z-53—502Z-58; RX 502Z-76—502Z-128.) The task force, which was formed in 1972 (RX 502Q-502S), surveyed insurance departments to identify concerns relating to title insurance regulation (RX 502Z-45—502Z-48). The 1979 survey identified rate making as one of several subjects warranting further study. (RX 502Z-54.) The task force also gave attention to the methods for determining whether a title insurance rate is excessive, inadequate or unfairly discriminatory. (RX 502Z-64—502Z-72.) In 1982, the task force completed its drafting of a model title insurance act, many aspects of which were adopted in the Montana Title Insurance Act, enacted in 1985. (RX 502Z-103—128; Mont. Code Ann. §§ 33-25-104 to 33-25-403.)

The Montana insurance department in 1980 had asked that "consideration [be given] to the organization of an advisory committee to provide this office with a profitability study on the business of title insurance in Montana." (RX 514, J.A. 164-65.) At that time, the department had expressed concern that individual insurers were filing rates that would threaten insurer solvency. *Id.* The department objected to a March 1980 rate filing by the Title Insurance Company of Minnesota on the ground that "[t]o decrease rates would . . . possibly jeopardize the financial security of your company." (RX 506.) The department also rejected an April 1980 Chicago Title filing, although it indicated a willingness to consider "additional information . . . which would assure us that this filing would not result in 'inadequate' rates." (RX 511.) The department rejected another Chicago Title filing two months later stating that "we have the administrative duty to protect the solvency of companies." (RX 513.) The department eventually withdrew its objection to the lower rates filed by Chicago Title but pointed out that if its "profits continue to decline, we will have no alternative but to request that you either increase rates or discontinue the sale of title insurance in our state." (RX 514, J.A. 164.)

The Montana rating bureau's filing of February 1983 was accompanied by a five page letter submitted in order to justify the rates pursuant to the state statutory criteria. (CX 41A-41E, J.A. 94-99.) The letter pointed out that rates then in use by most individual insurers in Montana were adopted in 1966, so that the use of such rates when "considered with the tremendous increase in operational costs caused by the inflationary trends of our economy," (CX 41E, J.A. 99), "makes the profitability of the Montana title insurance industry questionable," (CX 41B, J.A. 95). Further, the letter noted that nationally the title insurance industry had "lost \$63.6 million in 1980, \$110.3 million in 1981 and the figures for the first half of 1982 indicates [sic] an even poorer performance."

(CX 41B, J.A. 95.)<sup>19</sup> This letter also pointed out that in response to severe losses in the industry, most title insurance companies had "taken drastic steps to reduce expenses." (CX 41C, J.A. 97.) The letter stated that the rating bureau would submit a profitability study within the following year but that the solvency threat to the industry mandated prompt submission of the proposed rates for approval. (CX 41E, J.A. 99.)

A representative of the bureau personally delivered the rate filing and support letter to the commissioner on February 22, 1983. The commissioner escorted the bureau representative to the department official in charge of title insurance rate filings, who discussed the filing with the bureau representative: "We took a look at the filing, discussed the filing for a while, talked about its contents and discussed also what type of justification they would want as far as statistics." (*Statton* 2858, J.A. 88.) The regulator explained the format of the statistics that would be required by the department. (*Statton* 2859, J.A. 88.) According to the ALJ, the bureau "was told that while the increase would go into effect immediately, additional support would have to be provided." (Pet. App. 213a.) Although the statistical information was collected by the bureau (*Statton* 2859, 2868), before it could be submitted to the department most members had withdrawn. (*Statton* 2863, 2868.)

The bureau filing of October 18, 1984, (CX 43A-43Z-25), which was "basically a clarification of the 1983 filing plus an increase in the charges for special endorsements" (Pet. App. 213a n.267), precipitated a request from the department for supporting documentation (RX 227) which was submitted on December 18, 1984. (CX 44A-44E.) Although the department approved the filing to be effective January 2, 1985, (CX 45), apparently only two members remained in the bureau at that time. (*Statton* 2858.)

<sup>19</sup> The department had earlier requested national data in support of individual filings. (RX 508).



Respondents resigned from the Montana bureau over the period from July 1983 to January 1985, and the bureau had ceased to function by January 1985. (Pet. App. 214a, 217a.)

(4) **Wisconsin.** The Wisconsin rating bureau submitted general rate filings in 1971, 1981 and 1982, as well as various endorsement filings.

The Wisconsin bureau was formed in 1969 with the encouragement of the insurance department. (*Donahoe* 1615-16, J.A. 2; CX 107.) At a meeting of the bureau and insurance department personnel prior to its initial filing (*Donahoe* 1619-20; J.A. 2-3; RX 302, J.A. 130-31), the department "indicated that [it] would carefully review [the] filing when formally made." (RX 302, J.A. 2-3). Bureau personnel explained to the department that the rate filing would be based upon "historical rates." (Pet. App. 198a; *Donahoe* 1618, 1620, J.A. 2-3.) Because the industry had no composite statistical data reflecting the newly filed rates, the department indicated that the "filing would be accepted subject to the subsequent filing of rate justification statistics" demonstrating the composite experience of the industry under the filed rates. (*Donahoe* 1619-20, J.A. 3.)

The department responded to the 1971 filing by indicating that the rates were acceptable but requesting an explanation for the fact that search and examination charges were filed only for certain southeastern counties in Wisconsin. (RX 303, J.A. 132-33; *Donahoe* 1623, 1625.) The department subsequently rejected the bureau's explanation (*Donahoe* 1626), and the rate bureau in 1974 submitted an amended filing extending the geographic scope of the search and examination charges (RX 312), which was approved (Pet. App. 198a).

Beginning prior to the approval of the initial filing and continuing over the next several years, bureau and insurance department officials discussed the development of rate justification materials and other matters. Depart-

ment and bureau personnel met in July 1973 (RX 305, J.A. 134; RX 306; RX 307, J.A. 135), and again in March and July 1974 (RX 309-09A; RX 316, J.A. 139). In February and April 1975, the department held hearings that dealt with rate justification and other title insurance issues. (RX 320-320E; *Plotkin* 2585-86, J.A. 65.) In August 1976 a department rate analyst, based on information that had been supplied at the 1975 hearings and later information, concluded that the industry "appear[ed] to be following the depressed earnings cycle of the property liability business fairly closely" and "suggested that we take another look at this when the 76 results are in to see if there has been any improvement in the earnings of this industry." (RX 335, J.A. 148.)

A proposed data collection system designed for the bureau by the A.D. Little consulting firm was submitted in August 1976. (RX 334 to 334Z-19; *Plotkin* 2587-88, J.A. 66.) Bureau and department personnel met in September 1976 to discuss the data collection system, (RX 336-336B, RX 340), and the plans were officially submitted to the department in November 1976 (RX 340), and were reviewed and approved by it. (RX 341, J.A. 150-51.)

In February 1981 the bureau submitted its first general rate adjustment. (*Donahoe* 1645-46; *Grabski* 1703-04; *Wirtz* 1811.) At a meeting with a bureau representative before the filing, a department representative was "adamant" that any rate increase would have to be justified "because the department was not about to okay increases in rates just offhand." (*Grabski* 1704, J.A. 8.) When the rate filing was received, the department rate analyst "discussed it with [his] supervisor" and stated that "it would be wise for us to look at it closely." (*Wirtz* 1750, J.A. 16.) Because the filing proposed a rate increase of approximately eleven percent (*Wirtz* 1751, J.A. 16), the department told the bureau that it "could very well" hold a hearing on the matter unless sufficient justification was submitted (*Grabski* 1707-08, J.A. 9-10). The department advised the bureau by letter in April



1981, that the filing was "in the process of being reviewed" and that "there may be a need to request further documentation regarding the rate change." (RX 367, J.A. 152.) The rate analyst continued his review of the filing as follows:

I put on my actuarial hat and, first of all, took all the information that was in the filing and checked its mathematical accuracy. In addition to that, I pulled out the Plotkin studies to use what was relevant in that and checked it against the numbers in the filing.

In addition to that, I pulled out all the annual statements for the title companies and I added together the numbers of those companies involved in the rate filing. And I also checked that against the accuracy of the rates in the rate filing, the accuracy of the data in the rate filing. And then I adjusted the rates at different levels to see how different rate increases would [affect] residential versus commercial and played with different kinds of rates and so forth. (Wirtz 1752, J.A. 17.) He continued his review by making a rate comparison with rates in effect in Minnesota and Illinois. (Wirtz 1825, J.A. 20.)

Bureau and department personnel met in May 1981 to discuss the filing. The primary concern of the department representatives was the adequacy of the justification submitted for the rate increases. After the meeting the bureau supplied additional statistical material. (RX 369-369A, J.A. 153-54; RX 370-370Z-17, J.A. 155-62; Grabski 1710-11, J.A. 10-11.) A similar meeting was held in late July 1981 (RX 371; Grabski 1713, J.A. 11-12), at which time the "Commissioner was '95%' convinced that [the] filings were acceptable," (RX 371). Although the rate analyst thought there were "grounds to attack" the filing and there were some "weaknesses in it," he "went through a weighing and judgmental process" and "came to the conclusion that it was justified." (Wirtz 1824-25). He testified that he "looked at

the submission by the rating bureau very carefully because it was a substantial one" (Wirtz 1824), and that we "gave the 1981 filing an intensive review" (Wirtz 1799, J.A. 20). Thereafter he informed the president of the bureau that the department accepted the 1981 filing. (Grabski 1714, J.A. 12.) The Commission concluded, without record citations, that the 1981 filing was checked "merely for mathematical accuracy." (Pet. App. 63a.)

The Wisconsin bureau submitted its third and final general rate filing in October 1982. (RX 374; Grabski 1715, J.A. 13.) Before the filing was submitted, the president of the rating bureau had had "three or four discussions" with the rate analyst "explaining to him what direction we were going in." (Grabski 1715, J.A. 13.) The rate analyst stated "that if you are talking about rate increases, you better be prepared to justify them." (Grabski 1715, J.A. 13.) The rate filing was accompanied by an A.D. Little analysis which concluded "that the proposed rates result in an annual pro forma overall rate of return on total capital of 5.94%" while the rate of return from the existing rates would be 0.09%. (RX 375B-375C; RX 374A.) According to Dr. Plotkin, this information made it "obvious" that the proposed rates were not excessive. (Plotkin 2604-05.) The rate analyst "reviewed the filing" (Wirtz 1757, J.A. 18; RX 377, J.A. 163), and requested a replacement copy of the A.D. Little financial report for the years 1972-1981, which was supplied by the rating bureau (RX 377, J.A. 163). Thereafter, the department accepted the filing. (RX 378.)

In addition to its three general rate filings, the bureau from time to time made endorsement filings, some of which specified a rate for the endorsement coverage. The record shows scrutiny of the coverage provided by these forms (e.g., RX 314, RX 315, RX 342, RX 343-343B; Grabski 1695; Wirtz 1760; RX 373, RX 380-380A), some severe questioning of particular coverage, (e.g., regarding a proposed zoning endorsement, the department

asked: "How can a zoning classification of property be categorized as an encumbrance or defect in title?" RX 315), and occasional rejection of proposed endorsements (e.g., RX 373D). As to proposed rates for certain endorsements, the rate analyst testified that "we would look at them and apply some kind of a judgment sense as to whether they were too high or too low." (Wirtz 1769, J.A. 18.) The department was apparently unsure what information could be generated that would scientifically "justify" any particular endorsement rate. (Wirtz 1808.) (The rate analyst testified that "[j]udgment rating is a very common element in rating." Wirtz 1808.) In addition, the Wisconsin department chose to devote fewer resources to the review of rates for endorsement filings because experience had shown that these rates were kept in check by competition among title insurance companies through the filing of "deviation" rates. (Wirtz 1804-05.)

The Wisconsin bureau was dissolved effective December 31, 1984. (Pet. App. 200a.)

#### SUMMARY OF ARGUMENT

The Federal Trade Commission challenged the state regulatory programs at issue here by singling out particular regulatory actions that, in its view, could have been done better. The Third Circuit correctly held that this qualitative assessment cannot be squared with the teachings of this Court and basic principles of federalism.

The state action doctrine holds that state anticompetitive activity is not subject to federal antitrust law, because of the special status of States as sovereigns within the federal system. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344, 1351 (1991) ("*City of Columbia*"). In state action analysis, a State's active supervision serves "essentially an evidentiary function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) ("*Hallie*"). Active supervision is proof that the State's anticompetitive program is a legitimate one that

seeks to have private actors conform to the State's policies, and is not merely an attempt by the State to immunize private actors from antitrust liability. *Id.*; *Midcal*, 445 U.S. at 106. To serve this evidentiary function without intruding unnecessarily on state sovereignty, the active supervision inquiry focuses on whether a legitimate regulatory program exists—a program, that is, in which "state officials have and exercise power" to review anticompetitive activities. *Patrick*, 486 U.S. at 100-01.

The active supervision standard used by the Third Circuit Court of Appeals below is adopted from a decision of the First Circuit which also rejected the Commission's approach. *New England Motor Rate Bureau Inc. v. F.T.C.*, 908 F.2d 1064 (1st Cir. 1990) ("*New England*"). The standard strikes a careful balance between federal antitrust goals and the federalism concerns underlying the state action doctrine. It recognizes that state statutory systems are strong evidence of active supervision when they provide officials with both the legal authority and the duty to regulate according to established regulatory standards. Further evidence may be found, as the Third Circuit concluded, in the fact that a program is "in place, staffed and funded," and shows "some basic level of activity directed toward seeing that the private actors carry out the state's policy and not simply their own policy." (Pet. App. 28a, quoting *New England*, 908 F.2d at 1071.) In the States here there was abundant evidence of legitimate regulatory programs, both in the statutes and in regulatory activity.

The Commission's approach, in contrast, intrudes into state regulatory decisions in order to further federal antitrust policy objectives. The Commission did not limit itself to determining that regulatory programs existed but substituted its own judgment concerning the quality of state regulation. The Third Circuit correctly held that the FTC was in error because "[t]he principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in



a manner that a federal agency or a federal court finds to be preferable." (Pet. App. 37a.)

If such intrusive second-guessing is permitted as part of active supervision analysis, the resulting unpredictability would substantially diminish the flexibility of the States to regulate. State programs requiring private cooperation could not function if cooperation exposed the participants to the threat of antitrust liability. In short, the Commission's approach to active supervision ignores the evidentiary function of the requirement and is contrary to the federalism principles underlying the state action doctrine.

#### ARGUMENT

##### I. THE ACTIVE SUPERVISION REQUIREMENT WAS DESIGNED TO ASSURE THAT THE STATE ACTION DOCTRINE APPLIES ONLY WHERE THE STATE HAS ESTABLISHED A PROGRAM OF SUPERVISION TO IMPLEMENT ITS REGULATORY POLICIES.

As the Court has observed, "[t]he starting point in any analysis involving the state-action doctrine is the reasoning of *Parker v. Brown*, [317 U.S. 341 (1943) ('*Parker*')]."<sup>1</sup> *Hoover v. Ronwin*, 466 U.S. 558, 567 (1984) ("*Hoover*"); *Hallie*, 471 U.S. at 38. In *Parker*, relying upon principles of federalism and state sovereignty, this Court held that the federal antitrust laws were not intended "to restrain state action or official action directed by a state." 317 U.S. at 351.

In decisions since *Parker*, this Court repeatedly has invoked this federalism theme and has articulated a state action test that recognizes "the States' freedom to engage in anticompetitive regulation." *City of Columbia*, at 1353. The most comprehensive enunciation of this theme is found in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 50 (1985) ("*Southern Motor Carriers*"), where the Court applied the state action doctrine to the same kind of activity as is involved

in this case, i.e., tariff filings by rating bureaus. The Court rejected a reading of state action that would have required that States compel rating bureau membership, on grounds that a "compulsion requirement is inconsistent" with the "principles of federalism and the goal of the antitrust laws" because "[i]t reduces the range of regulatory alternatives available to the State." *Id.* at 61. In doing so, the Court affirmed that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Id.* at 56.

Because federalism principles lie at the core of the state action doctrine, the doctrine does not place substantive limits on state regulation. When, as here, a State's anticompetitive program is "clearly articulated and affirmatively expressed as state policy," the only additional requirement for state action is that the activity conducted pursuant to that policy be "actively supervised" by the State itself." *Midcal*, 445 U.S. at 105 (citation omitted).

As this Court has explained, the active supervision requirement "serves essentially an evidentiary function." *Hallie*, 471 U.S. at 46. It addresses the risk that a state might attempt to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Midcal*, 445 U.S. at 106 (quoting *Parker v. Brown*, 317 U.S. at 351). See also *Patrick*, 486 U.S. at 100-01; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987) ("*324 Liquor*"). The active supervision requirement ensures that a State has not clearly articulated an anticompetitive policy merely to thwart federal law with "a gauzy cloak of state involvement." *Midcal*, 445 U.S. at 106. Active supervision serves as proof that when a State has authorized an anticompetitive program, the program serves "the governmental interests of the State," rather than purely private interests. *Hallie*, 471 U.S. at 47. See also *Pat-*



rick, 486 U.S. at 100-01; Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 501 (1987).

This Court has applied the active supervision requirement articulated in *Midcal* in only three cases: *Midcal*, 324 *Liquor* and *Patrick*. In *Patrick*, the Court said that active supervision "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." 486 U.S. at 101. However, these cases all involved States which had authorized private anticompetitive conduct yet failed to establish a regulatory system for the supervision of that conduct. Thus, the Court has not directly addressed the application of the active supervision requirement in a case such as this one, in which States have provided by legislation for regulatory supervision and state regulators have reviewed private conduct.

To be consistent with the principles of federalism and state sovereignty underlying the state action doctrine, the requirement of active supervision should not be interpreted so as to require state regulation to conform to a particular design. See *Patrick*, 486 U.S. at 101-05; *Midcal*, 445 U.S. at 105-06. See also *Southern Motor Carriers*, 471 U.S. at 61 (interpreting state action so as to avoid "reduc[ing] the range of regulatory alternatives available to the State"). The active supervision requirement should be satisfied by the *existence* of a regulatory program. As long as a State has clearly articulated its intent to replace competition with regulation and has established a regulatory program, there is assurance that the State is not merely authorizing antitrust violations.

The *quality* of a State's regulatory program should have no bearing on active supervision analysis. The quality of a state regulator's work is, of course, a matter of concern to the State seeking to fulfill its policy objectives. But once the existence of a regulatory pro-

gram is established, it would serve no purpose to involve federal antitrust tribunals in policing the effectiveness of state programs designed to serve public policies that may conflict with federal antitrust goals. Indeed, if federal antitrust tribunals were permitted to overrule the States' determinations on how best to achieve their policies, "the state action doctrine would be turned on its head." *New England*, 908 F.2d at 1071. See *City of Columbia*, 111 S.Ct. at 1350 (rejecting interpretation of state action that would transform "state administrative review into a federal antitrust job," quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 212.3b, at 145 (Supp. 1989)).<sup>20</sup>

The design and implementation of a regulatory program, as well as particular regulatory decisions, depend largely upon policy judgments, such as how best to allocate state resources and how to balance a variety of state policy goals. Such judgments are traditionally matters of state prerogative. As this Court observed in *Hoover*, 466 U.S. at 574, the issue is not whether "the sovereign [has] acted wisely" but simply whether "the state [has acted] as sovereign." *Accord, Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) ("A state's antitrust immunity springs from an essential principle of federalism, the necessity to respect a sovereign capacity in the several states. . . . Given this purpose, it follows that actions otherwise immune should not forfeit that protection merely because the state's at-

<sup>20</sup> Professor Milton Handler has stated:

What would be inconsistent with *Parker* would be an inquiry into the effectiveness of the state's supervision, for then the federal courts would be making subjective judgments about the adequacy and not merely the actuality of state regulation—the kind of second-guessing which . . . runs directly counter to the principle of federalism upon which *Parker* rests.

Milton Handler, *Antitrust* 1978, 78 Colum. L. Rev. 1363, 1386-87 (1978).

tempted exercise of its power is imperfect in execution under its own law." (citation omitted)).<sup>21</sup>

Moreover, post hoc judgments as to the quality or effectiveness of state regulatory determinations will lack predictability and for this reason will undermine state regulatory programs. State programs such as those here are possible only if private parties participate. See *Southern Motor Carriers*, 471 U.S. at 58. If participation involves a substantial risk of antitrust liability—that is, if the quality or effectiveness of the States' regulatory determinations may be subject to later federal antitrust review—the programs will fail for lack of participation.<sup>22</sup> Such a review cannot be part of the active

<sup>21</sup> See also, e.g., Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 692 (1991) ("State administrative law, not antitrust review, is the proper remedy for preventing state agencies from exceeding or abusing their authority. States can always provide further remedies if they find them necessary."); Phillip E. Areeda, *Antitrust Immunity For "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 453 (1981) ("'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.").

<sup>22</sup> In this case, the pendency of the FTC's investigation caused so many title insurers to withdraw from rating bureau participation that by the time the FTC filed its complaint in January 1985, all the existing title insurance rating bureaus in the country had effectively ceased to function. The title insurers' antitrust liability concerns were not fanciful. Beginning within hours after the FTC filed its complaint, the Respondents became defendants in a series of more than a dozen private treble damage class actions. See *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D.Pa. 1986), *aff'd mem.* 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988). Though these class actions were settled, *id.*, later cases continued to be filed arising out of the same matters as the FTC case, two of which are still pending. *Brown v. Ticor Title Ins. Co.*, No. CIV-90-0577 PHX SMM (D. Ariz., summary judgment granted March 5, 1991), *app. pending*, No. 91-15474 (9th Cir.); *Prentice v. Title Ins. Co. of Minnesota*, No. 89-CV-012004 (Circuit Ct., Milwaukee Cty., Wis., dismissed Jan. 18, 1991), *app. pending*, Docket No. 91-1580 (Wis. Ct. App.).

supervision analysis, since it would subvert, rather than implement, the state action doctrine. Cf. *City of Columbia*, 111 S.Ct. at 1351 (rejecting conspiracy exception because it "would virtually swallow up the *Parker* rule").

The active supervision requirement must be applied with a view to its evidentiary purpose and federalism principles. Applied this way, the inquiry here should be straightforward. The legitimacy of the type of program at issue here is not subject to reasonable dispute. This Court in *Southern Motor Carriers* acknowledged the usefulness of collective rate filing through rating bureaus as part of a system of state regulation. 471 U.S. at 51. The state programs in this case were not ones in which the States merely authorized private anticompetitive conduct. The States enacted comprehensive regulatory programs with staffed and funded agencies charged with assuring that the States' rate policies were adhered to. Over the period encompassed by this proceeding, regulators gave administrative attention to these bureaus and their rate filings. Such regulatory programs amply satisfy the goals of the active supervision requirement, as the Third Circuit held.

## II. THE THIRD CIRCUIT FAITHFULLY APPLIED THIS COURT'S STATE ACTION PRECEDENT IN REVERSING THE DECISION OF THE FEDERAL TRADE COMMISSION.

1. The Third Circuit applied a standard of active supervision articulated by the First Circuit in the *New England* case:

Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrate some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.



(Pet. App. 28a, quoting *New England*, 908 F.2d at 1071.)

This standard is not a "toothless" legal standard that does away with the active supervision requirement. FTC Brief at 22. Nor is it true that these Circuits "did not purport to derive [their] legal standard from any decision of this Court." *Id.* at 21. On the contrary, the standard applied by both Circuits respects the principles of state sovereignty and federalism underlying the state action doctrine, and follows this Court's directive to apply the active supervision requirement by focusing on whether the State "ha[s] and exercise[s] power to review" the private acts at issue for conformance to state policy. *Patrick*, 486 U.S. at 101.

In assessing whether the State "has" regulatory power, these Circuits asked whether the state agency had the legal authority to review and disapprove filed rates for failure to conform to substantive state regulatory criteria. (Pet. App. 28a.) This initial focus of the Circuit Courts' test is consistent with the body of cases in this Court and others that have determined whether a regulatory program exists by inquiring whether state statutes grant authority for substantive review of regulated conduct. *E.g. Patrick*, 486 U.S. at 102 (no active supervision where state statutory scheme did not empower state regulators or courts to engage in substantive review of the regulated conduct); *324 Liquor*, 479 U.S. at 335-36 (no active supervision where state statutes did not give regulators authority to approve or disapprove privately set price schedules, because "[t]he State has displaced competition among liquor retailers without substituting an adequate system of regulation"); *Midcal*, 445 U.S. at 106 (statutory scheme that did not empower state regulators to review the reasonableness of filed price schedules did not satisfy active supervision requirement); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (state action doctrine applied on the basis of a review of the statutory provisions at is-

sue). Indeed, no decision of this Court has ever found an absence of active supervision where there was state authority to engage in substantive review of the regulated private conduct.<sup>23</sup>

Lower federal courts have found active supervision on the basis of the existence of a statutory system of regulation. For example, in *Capital Telephone Co. v. New York Telephone Co.*, 750 F.2d 1154, 1163-64 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985), the Second Circuit determined that active supervision existed by finding that "the state legislature had 'expressly conferred' powers upon the [Public Service Commission] which enabled it to review rates and other aspects of telephone company operations for reasonableness." *Id.* at 1163. After reviewing the New York statutory program, the court concluded:

It would be inconsistent with such a broad regulatory scheme to find that the particular activities in question are subject to antitrust liability where the legislature so clearly intended to allow the PSC to control all activities which are a reasonable part of such a regulatory scheme. Therefore, we agree with the district court that this regulatory program constitutes "active supervision" under *Midcal*.

*Id.* at 1164.<sup>24</sup>

<sup>23</sup> In fact, the "have and exercise" language of *Patrick* had its genesis in this Court's review of the statutory schemes of regulation in *Southern Motor Carriers*:

Common carriers are required to submit proposed rates to the relevant commission for approval. A proposed rate becomes effective if the state agency takes no action within a specified period of time. If a hearing is scheduled, however, a rate will become effective only after affirmative agency approval. The State Public Service Commissions thus have and exercise ultimate authority and control over all intrastate rates.

471 U.S. at 50-51 (emphasis added, footnotes omitted).

<sup>24</sup> See also, *Llewellyn v. Crothers*, 765 F.2d 769, 773 (9th Cir. 1985); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 390-91 (7th Cir.



However, the Circuit Court standard applied here goes beyond inquiring whether the State "has" power to regulate pursuant to the statutory system of regulation. It also requires evidence demonstrating that the State in fact "exercised" its powers of review under that system. The standard looks to the terms of the statutes themselves for evidence that state officials are granted not only "ample power" but also the "duty" to regulate, and that the program is "enforceable in the state's courts." (Pet. App. 28a.) In addition, the Circuit Court standard demands a showing that in fact the regulatory program is "in place, staffed and funded," and that there is "some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy." *Id.*

The reasoning underlying this approach begins with the recognition that the very existence of a statutory program of regulation provides evidence that state regulatory control is actually being exercised. This conclusion results from provisions of state law that affirmatively impose on state officials regulatory duties—"duties which a federal court may not, under normal principles of federalism, assume [state officials] will disregard." *New England*, 908 F.2d at 1072.<sup>25</sup> To assure that these

1984), *cert. denied*, 472 U.S. 1027 (1985); *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 824-25 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); *Morgan v. Division of Liquor Control*, 664 F.2d 353, 356 (2d Cir. 1981); *Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority*, 715 F. Supp. 1290, 1298 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989); *Capital Telephone Co., Inc. v. City of Schenectady*, 560 F. Supp. 207, 210-211 (N.D.N.Y. 1983); *Fisher Foods, Inc. v. Ohio Dept. of Liquor Control*, 555 F. Supp. 641, 647 (N.D. Ohio 1982).

<sup>25</sup> The presumption of regularity attaching to official conduct is recognized in precedent in this Court and in each of the states at issue. *E.g. U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts

duties are not "mere precatory maxims," the standard further inquires whether the regulatory duties imposed on state officials are "enforceable by mandamus and other legal remedies in state courts." *Id.* at 1072 n.10.

The Circuit Court standard seeks further confirmation of the exercise of state regulatory power by requiring evidence that the program is "in place, staffed and funded," and of "some basic level of activity directed towards seeing that the private actors carry out the State's policy and not simply their own policy." (Pet. App. 28a, *quoting New England*, 908 F.2d at 1071.)<sup>26</sup> This formulation reflects a careful balancing of the inherent tension between the federalism principles underlying the state action doctrine and the evidentiary purpose of the active supervision requirement. By inquiring into the *existence* of state regulatory activity "directed towards seeing that the private actors carry out the state's policy," the Court of Appeals standard embodies precisely the purpose of the active supervision requirement as articulated by this Court in *Hallie*—the "essentially . . . evidentiary function" of "ensuring that the actor is engaging in the challenged conduct pursuant to

presume that they have properly discharged their official duties.") *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55 (1937); *Ross v. Reed*, 14 U.S. (1 Wheat.) 482, 486 (1816); *Berry v. Merchants Life & Cas. Co.*, 195 N.W. 335, 336, 181 Wis. 487 (1923); *Trustees, Missoula County School Dist. 1 v. Anderson*, 757 P.2d 1315 (Mont. 1988); *Cagle v. Home Ins. Co.*, 14 Ariz. App. 360, 483 P.2d 592, 598 (1971); *Bowman v. 1477 Central Ave. Apartments*, 203 Conn. 246, 524 A.2d 610, 615 (1987).

<sup>26</sup> Contrary to the FTC's contention, the Circuit Court standard would not permit a finding of active supervision based on a record showing nothing more than "inaction or passive acquiescence" by the State with respect to the private conduct. FTC Br. at 20. By its express terms, the standard requires that the States act not only to establish a regulatory program with the specified powers, duties and substantive criteria, but also to staff and fund the program, and that there be evidence of "activity" directed toward seeing that private actions conform to state policies.

state policy." *Id.* at 46. At the same time, by carefully avoiding an evaluation of the *quality* or the *effectiveness* of the State's activity, the Circuit Court formulation embodies the respect for state regulatory autonomy that is the heart of the state action doctrine itself. The question it asks is the proper one: Having established a system to regulate according to substantive state policies, is the State taking steps—engaging in a "basic level of activity"—to see that its policies are followed? The choice of supervisory activities is left to the State, whose policies and program are its own.

The Third Circuit correctly found that the facts in the administrative record established "active supervision" under the appropriate legal standard in each of the four States. In each State, the court looked first to the statutory provisions under which the regulatory program was administered, and found that the statutes gave the insurance departments both the power and the duty to regulate the filed rates under declared standards of state policy. (Pet. App. 30a-31a, 33a, 35a, 36a.) It found that the duty to regulate was enforceable in the State's courts. *Id.* Assessing the administrative record, it found that the program of supervision in each State was "in place, staffed and funded" during the period at issue, and that in each State the insurance department demonstrated activity directed toward seeing that the regulated title insurers carried out the State's rate policies. (Pet. App. 31a, 33a, 35a, 36a-37a.) On the latter point, the Third Circuit eschewed the Commission's approach of criticizing the *quality* of state activity, finding the *existence* of supervisory activity in record evidence that state regulators review rate filings, sought additional information from regulated parties, established policies to examine rate filings, and approved certain rates. *Id.*<sup>27</sup> As the dis-

<sup>27</sup> The Commission argues that the Third Circuit erred by citing evidence of state regulatory approvals which in the FTC's view pertained only to the form of a rate filing, and not to conformance with substantive rate criteria. (FTC Br. 23-24 n.16, 29, 30). The Com-

cussion earlier in this brief indicates, the Third Circuit's conclusion is amply supported by the substantial record evidence of regulatory activity.

Any test of active supervision which involves an evaluation of the actual activities of state regulators risks, as the ALJ said, "laps[ing] over into a qualitative evaluation of the performance of state officials." (Pet. App. 239a.)<sup>28</sup> However, the First and Third Circuits' careful approach permits a focused but deferential inspection of actual state supervision, leaving to the States themselves rather than federal antitrust authorities the details of enforcing state regulatory programs. It comports fully with this Court's statements of the scope and purpose of the active supervision requirement, and the federalism principles on which the state action doctrine is based.<sup>29</sup>

mission cites no record support for its distinction, which was never referred to in its decision below. Moreover, the state statutes when using the language of "approval," "disapproval" or similar terms, consistently refer to substantive issues and make no provision for approval as to form. E.g., Ariz. Rev. Stat. Ann. §§ 20-376(D), 20-378 (J.A. 168, 170-71); Conn. Gen. Stat. Ann. §§ 38-201n(c), 38-201x(a)(2), -(b)(2) and -(b)(4) (J.A. 177, 184-85, 186, 187); Mont. Code Ann. § 33-16-205 (J.A. 196); Wis. Stat. Ann. §§ 625.13(2), 625.22 (J.A. 207, 208-09). The distinction appears to be another way for the FTC to inquire into the quality and merits of state regulatory decisions, in contrast to the Third Circuit's approach of ascertaining the existence of state activity directed towards seeing that state law requirements were carried out.

<sup>28</sup> Federal courts should not "scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma" because "[t]here simply is no way to tell if the state has 'looked' hard enough at the data." 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 213c, at 75 (1978).

<sup>29</sup> The state action doctrine applies to private conduct not because the private conduct is transformed into the action of the State, but because a failure to apply the state action doctrine to private conduct would frustrate the ability of States to implement regulatory programs. *Southern Motor Carriers*, 471 U.S. at 56. Thus the anti-trust state action doctrine differs fundamentally from the concept of "state action" used to determine the scope of liability for claims



2. The flexibility permitted States under the Circuit Court standard is not acceptable to the FTC. Instead, the Commission proposes a more restrictive version of the test in *Patrick*, which requires that state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." 486 U.S. at 101. The *Patrick* standard requires the cop to be on the beat. But the Commission finds the active supervision requirement satisfied only where there is "an affirmative determination by state officials that the particular activity at issue is consistent with state policy." (FTC Br. at 20.) The FTC standard finds active supervision only where the cop catches every miscreant and awards a gold star to every law abiding citizen.<sup>30</sup>

The Commission's reformulation of *Patrick* would work to "reduce[] the range of regulatory alternatives available to the State" as clearly as the compulsion test rejected in *Southern Motor Carriers*, 471 U.S. at 61. The choice of the procedures to implement its regulatory programs is a matter for the State to decide. Visible, affirmative determinations, in advance, by state officials that planned private conduct comports with state policy (which the FTC demands) may be one way of assuring that the State has exercised its power to review. But in

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of deprivation of constitutional rights under 42 U.S.C. § 1983, referred to at FTC Br. 20 n.12. There is no reason to equate the antitrust doctrine's interest in furthering private parties' conformance to state regulatory policies with the § 1983 mechanism, which is intended to frustrate state actions that infringe on constitutional rights.

<sup>30</sup> This Court's formulation of the active supervision requirement in *Patrick* contemplates that state officials have and exercise the power to "review" private anticompetitive acts and to "disapprove" those that do not comport with state policy. 486 U.S. at 101. Nowhere is it stated that the state officials must act "affirmatively to review and approve" the private acts, as the Commission contends. (Pet. App. 55a.)

the real world it is certainly not the only way, and may not be the best way, to ensure that the State's policies are followed on an ongoing basis.

It may be entirely reasonable, for example, for a state regulator to achieve compliance with state policies in precisely the opposite fashion—by withholding approval of certain private conduct but placing the regulated parties on notice of its powers to act against them if their conduct should fail to conform to regulatory standards. Similarly, many States have chosen to adopt procedures by which proposed action is deemed approved if it is not rejected by state officials. These "deemer" or "negative option" procedures are designed to provide regulators the opportunity to allow proposed action to become effective without affirmative approval.<sup>31</sup> When a regulator reviews filings and allows them to become effective there is no reason to assume that the regulator is not actively supervising. A regulator interested in results rather than empty formalities may find that she can achieve compliance by regulated parties with state policy most effectively by allocating the State's resources to particular private conduct that the State deems most important.<sup>32</sup>

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<sup>31</sup> By statute, proposed rates in the four States at issue were effective if the state agency took no affirmative action to challenge the filed rate. However, the Commission's reliance upon these statutes (FTC Br. at 3, n.2) ignores the ALJ's finding that in actual practice the bureaus in Arizona and Wisconsin did not implement major rate charges until after the filings were formally stamped as approved by the department. (Pet. App. 197a, 201a.) The record demonstrates that the same was true in Connecticut and Montana. (Pet. App. 191-2a, 195a, 213a.)

<sup>32</sup> Commissioner Azcuenaga, dissenting in part from the Commission's opinion in *New England*, commented upon the impact of the Commission's standard upon negative option procedures:

If use of negative option procedures is insufficient supervision for purposes of the state action doctrine, then the state will be forced to make a show of exercising its discretion to keep the [Federal Trade] Commission from interfering with the imple-



The Circuit Court standard recognizes that evaluating the legitimacy and effectiveness of such regulatory choices is beyond the proper scope of federal court review under the state action doctrine. By limiting its review of actual regulatory conduct to whether there is "some basic level of activity directed toward seeing that the private actors carry out the state's policy," this standard reflects the limited role that federal courts may properly play in reviewing the administrative activities of States.<sup>33</sup>

3. The Commission fundamentally distorts the Circuit Court standard by arguing that the standard is satisfied by the "mere availability of a state judicial remedy."

mentation of its regulatory policy. This in turn would reduce the state's discretion in a manner probably inconsistent with the state action doctrine.

*In the Matter of New England Motor Rate Bureau, Inc.*, 1989 FTC LEXIS 62, \*67 n.9 (Docket No. 9170, 1989).

<sup>33</sup> The FTC Amici claim that the active supervision standard adopted by the Third and First Circuits would undercut the States' ability to implement narrowly-tailored regulatory schemes, such as New Jersey's law prohibiting insurers from using rating organizations for any purpose other than pooling loss data. FTC Amici at 16. This claim is groundless because any State is free to authorize whatever level of regulation it wishes among private actors. The state action defense would not be applicable in a State that did not clearly articulate and affirmatively express a state policy permitting the activity at issue. Here each state clearly permitted collective rate filing by rating bureaus.

FTC Amici also suggest that the Third Circuit decision will impair their ability to enforce state antitrust law. FTC Amici at 1, 3. The argument is baseless. The state action doctrine protects conduct from federal antitrust law if the State has decided to regulate a sector of its economy. The doctrine has no effect upon the scope of state antitrust law. Rather, state law doctrines of implied exemption or implied immunity may operate to remove state regulatory programs from state antitrust vulnerability. *E.g., Reese v. Associated Hospital Service, Inc.*, 45 Wis.2d 526, 173 N.W.2d 661 (1970). Such exclusions, however, depend entirely upon the actions of state legislatures and are not affected by the decisions of federal courts applying the state action doctrine.

FTC Br. at 26. The standard makes clear on its face that its principal focus is the existence of staffed and funded regulatory bodies with statutory duties to see that state regulatory policies are carried out. Under the Circuit Court reasoning, state legal mechanisms providing for judicial oversight of regulators' actions merely confirm the legitimacy of the State's program, by assuring that the regulatory duties imposed on state officials are not merely "precatory maxims," *New England*, 908 F.2d at 1072 n.10. Nothing in the standard remotely suggests that the existence of judicial review mechanisms alone would suffice as evidence of active supervision.

The Commission also argues that the judicial mechanisms here fall "far short of satisfying the active supervision requirement" because they resemble those in *Patrick*. FTC Br. at 25 (quoting *Patrick*, 486 U.S. at 104). It argues that under state law, officials in the four States here "have discretion whether and to what extent to investigate a particular rate filing," and because of such discretion mandamus would not be available to require state officials to see that rates conform to state policy. *Id.* at 25-26. However, the Commission ignores the mechanisms for administrative and direct judicial review of rate review matters that are embodied in the statutes of all four States. In each State, persons aggrieved by any rate filing are provided with specific statutory rights to require the regulator to hold a hearing or otherwise review the filing to determine that it comports with the rate criteria.<sup>34</sup> Once invoked, these regulatory duties narrowly

<sup>34</sup> Ariz. Rev. Stat. Ann. § 20-378(B) (J.A. 170-171) (requiring a hearing if the regulator determines that the request is made in good faith and that the requester would be aggrieved if the grounds for the request are established); Conn. Gen. Stat. Ann. § 38-201p(a), (b) (J.A. 177-78) (requiring a hearing unless the regulator determines that there is no probable cause for the complaint or the request is made in bad faith); Mont. Code Ann. § 33-16-204 (J.A. 196-97) (requiring a hearing unless the regulator determines that there is no probable cause for the complaint or the request is

circumscribe any general discretion that otherwise might exist with respect to the regulator's review of particular rate filings, and would be enforceable by writ of mandamus even assuming the principles of mandamus law cited by the Commission and the FTC Amici.<sup>35</sup> Orders or decisions resulting from such administrative review are subject to state judicial review in the same fashion as other state administrative actions.<sup>36</sup> In short, the Third Circuit was correct in concluding that in each State the regulator's "duty to regulate pursuant to declared standards of state policy" was enforceable in the State's courts. (Pet. App. 30a, 33a, 35a, 36a.)

The existence of state agencies with the duty to review rates for compliance with substantive standards of state policy distinguishes this case from *Patrick*. In that case neither the state administrative agency nor the state judiciary had the authority to conduct more than a procedural review of the private conduct at issue. 486 U.S. at 101. Here, the existence of judicial review mechanisms serves to confirm the seriousness of these States in establishing a regulatory system where state administrative officials have the duty and authority to actively supervise private conduct according to substantive standards of state policy.<sup>37</sup>

made in bad faith); Wis. Stat. Ann. § 227.42 (requiring a hearing for any person whose substantial interest is injured or threatened by agency action or inaction).

<sup>35</sup> Cf. *New England*, 908 F.2d at 1072 and n.10 ("The Massachusetts statute, as noted, requires officials to maintain just and reasonable rates, to act on complaints, to correct discriminatory rates, to consider various specified factors, and so on. . . . Such duties are enforceable by mandamus and other remedies in state courts.")

<sup>36</sup> Ariz. Rev. Stat. Ann. § 12-901 *et seq.*; Conn. Gen. Stat. Ann. § 4-183; Mont. Code Ann. § 2-4-701 *et seq.*; Wis. Stat. Ann. § 227.52.

<sup>37</sup> The FTC Amici assert that there was no active supervision in Montana and Wisconsin because search and examination rates in those states were intended to be the result of competition, not regulation. FTC Amici at 9, 13-15, 17-20. Though they attempt to

### III. THE DECISION OF THE FEDERAL TRADE COMMISSION IMPROPERLY INTRUDED INTO STATE REGULATORY DECISIONS AND PROCEDURES.

The Third Circuit recognized the FTC's decision for what it was—an improper intrusion into state regulatory decisions and procedures.<sup>38</sup> The Third Circuit accurately

frame it as an active supervision issue, this argument in truth is addressed to prong one of the *Midcal* test—whether Montana had a clearly articulated and affirmatively expressed policy to displace competition with regulation.

Because FTC Complaint Counsel conceded that Montana and Wisconsin authorized collective rate filing, the clear articulation requirement has never been in issue in this case. (Pet. App. 26a.) Even the Amici admit that the clear articulation prong is not before the Court. FTC Amici at 9, n.6. Their attempt to raise the issue indirectly at this late date should be ignored. See U.S. Sup. Ct. Rule 37.6 (*amicus curiae* brief must comply with Rule 24, which restricts a brief on merits from raising a new questions); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (declining to consider argument of *amicus curiae* not raised by either of parties in Supreme Court or lower courts).

Moreover, FTC Amici are simply incorrect. Their reading of the Montana and Wisconsin statutes conflicts with the plain language of the statutes. Both States authorize cooperation between insurers in rate-making (Mont. Code Ann. § 33-16-101 (J.A. 191); Wis. Stat. Ann. § 625.01), and explicitly authorize rating bureaus to make required rate filings with the state insurance departments (Mont. Code Ann. § 33-16-203 (J.A. 195); Wis. Stat. Ann. §§ 625.13 (1), 625.15 (J.A. 207-08)).

<sup>38</sup> As the following indicates, on its face the FTC decision appears to intrude into state regulatory decisions far beyond inquiring whether the States "determine[d] whether the prices meet the State's regulatory criteria," the question it says is presented here. FTC Br. at (I). The FTC nonetheless has contended that the standard it urges in this Court is not different from that applied in its decision below. Reply Brief in Support of Petition for Certiorari at 1-2. Whichever view is correct, it is clear that the proper focus here is on the content of the FTC's decision. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943).



characterized the FTC's analysis of the active supervision issue:

The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal's* adequate supervision prong because the regulators in those states were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable.

(Pet. App. 37a.) The Third Circuit held that the "root of the FTC's error" lay in its "insistence on sitting 'in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes.'" (Pet. App. 32a) (*quoting New England*, 908 F.2d at 1076, emphasis in original). It determined that even if the FTC's evaluation of the quality of regulation were correct, "its conclusions miss the point":

Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable.

(Pet. App. 37a.)

The FTC's administrative decision repeatedly reflects its willingness to substitute its own judgment and objectives for the substantive decisions of state regulators. Indeed, the FTC decision misstates the very purpose of the active supervision requirement, framing the objective of the requirement not in terms of state supervision for compliance with state regulatory policy, but rather as "ensur[ing] that the state agency has consciously considered the anticompetitive consequences of the activity for which private parties seek approval." (Pet. App. 55a.) Similar substitution of the FTC's competition objectives for the State's regulatory objectives occurs repeatedly in the FTC decision, leading the Commission to reject various state

regulatory choices as "impermissible" under federal anti-trust principles, even though they further state regulatory policy. This fundamental error led the FTC to reject state regulatory decisions on such matters as 1) the manner of regulating insurer costs, 2) the use of historical rates as a justification for an initial bureau filing, 3) the allocation of administrative attention to minor filings, 4) the use of subsequent justifications and monitoring to assure compliance with the statutory rate criteria, and 5) staffing decisions.

1. In two States (Connecticut and Wisconsin), the Commission concluded that regulators' review and approval of filed rates was not proper because, in the FTC's view, "[t]here was no critical examination [by the regulator] of what lay behind those profit figures" and this was "fatal in and of itself" to Respondents' state action defense. (Pet. App. 57a, 59a.) This reasoning was not based on an absence of regulatory review and approval by the State—in Connecticut the regulator testified he approved the rate filing based on his conclusion that the proposed rates met the statutory standard, (*DiSanto* 2743-47, J.A. 77-78), and in Wisconsin the regulator testified that prior to approval he "gave the 1981 filing an intensive review" (*Wirtz* 1799, J.A. 20). Rather, the Commission determined that the departments in these States lacked the "wherewithal" to examine insurer expenses because "the department[s] lacked the authority to control insurer expenses they knew were excessive." (Pet. App. 59a.) As a result, the Commission reasons, the regulators could not "meaningfully" regulate a "critical" component of the ratemaking process. *Id.*

The Commission's analysis, focusing on the absence of direct regulatory authority to control these expenses, substitutes its own judgment regarding how rates should be regulated in these States for that of the legislatures. The legislatures decreed that insurance rates may not be excessive, and gave the departments the authority to reject



excessive rates. Conn. Gen. Stat. Ann. §§ 38-201c—201p (J.A. 172-80); Wis. Stat. Ann. §§ 625.11, 625.22 (J.A. 205, 208-09). The insurance codes do not authorize the department to directly regulate insurer expenses, but do specifically authorize the departments to consider past and prospective expenses in reviewing rate proposals. Conn. Gen. Stat. Ann. § 38-201c(b) (J.A. 172); Wis. Stat. Ann. §§ 625.11, 625.12 (J.A. 205-06, 206-07). The Commission does not suggest that the regulators in these States lacked power to attempt to force down the level of expenses by rejecting a proposed increase as excessive. The choice of how to design and implement a state regulatory program properly lies with the state legislature and regulators, not with the FTC.<sup>39</sup>

2. The Commission's willingness to dictate the substance of state regulatory decisions based on its own policy objectives is also reflected in its treatment of the initial rate filings made by the bureaus in Arizona in 1968 and Wisconsin in 1971. In these States the insurers, pursuant to then newly enacted state statutes, filed collective rates with the state regulators reflecting historical rates that had been charged by particular insurers in the open market. The collective rates were chosen in this fashion to comport with statutory provisions permitting the rates to be justified under the state regulatory criteria based on the experience of a title insurer doing business in the State. Ariz. Rev. Stat. Ann. § 20-377 (J.A. 169); Wis. Stat. Ann. § 625.12 (J.A. 206).

The Commission, invoking general federal antitrust principles, determined that "it is no excuse that the prices fixed are themselves reasonable" and therefore embraced its staff attorneys' argument that accepting prevailing rates is "not permissible." (Pet. App. 66a, 68a.) If, as

<sup>39</sup> Commissioner Azcuenaga, dissenting in part, concluded that "the Connecticut insurance department did all that was required of it by the statute" by its consideration of agency commission expenses when reviewing the bureau's filing. (Pet. App. 118a.)

this Court has said, the purpose of active supervision is to see that the State is carrying out its policies, it is difficult to understand why the Commission believed that it was "not permissible" for a regulator to accept filed rates that conformed to state policy.

3. The FTC treated the exercise of discretion by state regulators as a sign that the state regulators were not carrying out their regulatory responsibilities. The procedural rigidity demanded by the Commission's approach is reflected in its treatment of state oversight of various filings reflecting minor amendments or adjustments to the overall rate structure, or separate charges for particular policy endorsements. In Connecticut, Arizona and Wisconsin the Commission rested its finding of no active supervision in part on what it found to be insufficient oversight by state regulators of such filings. (Pet. App. 60a, 63a, 67a.)

Invoking the federal antitrust principle that "there is no *de minimis* exception to the antitrust laws for price-fixing," the Commission usurped the state regulatory function by holding it "impermissible" for a state regulator to determine to give lesser attention to filings with lesser economic importance. (Pet. App. 60a, 63a.) ("[W]hen a per se violation of the antitrust laws for price-fixing is involved, one need not judge economic import," Pet. App. 73a.) The obvious practical impact of the Commission's conclusion in this respect would be to force state regulators to expend more administrative energy on minor filings at the expense of giving less attention to significant filings. Such a result might satisfy the Commission's competition goals but it would do so at the expense of state regulatory policy.

4. The Commission's intrusion into the States' regulatory discretion is also reflected in its dissatisfaction with States that focused their supervisory activities on developing programs to monitor the economic effect of rates, following the acceptance by the departments of initial rate

filings by newly established rating bureaus. In Connecticut, Wisconsin and Arizona, after initial rate filings became effective the regulators, the bureaus and A.D. Little developed financial and statistical reporting plans designed to demonstrate the reasonableness of the rates on an ongoing basis. In Montana, the initial rate filing in 1983 was approved by the regulator subject to similar follow-up, but the bureau began to disintegrate before a report was produced.

Rather than recognizing these follow-up activities as indicia of active supervision, the Commission's analysis below ignored them or treated them as evidence that the regulators' review of the initial filings was inadequate. In Connecticut, the Commission decision makes no reference whatever to the later development of a reporting plan, focusing instead on its conclusion that there was no evidence, in the Commission's view twenty-three years later, that regulators' requests for information at the time of the initial rate filing were "answered satisfactorily." (Pet. App. 59a.) For Wisconsin and Arizona, the Commission's decision treats the eventual receipt by the regulators of reporting plan information justifying the filed rates as evidence of a "hands-off policy" by Wisconsin and proof that "there could not have been active supervision" by Arizona in the period before the information was received. (Pet. App. 62a, 68a.) For Montana the Commission took a slightly different tack, refusing to consider the regulator's requirement of statistical follow-up as evidence of active supervision, instead concluding from the failure of the reporting plan to be implemented that the rates *initially* "went into effect without being examined." (Pet. App. 76a.)

The Commission's reasoning, treating later regulatory follow-up as evidence of earlier insufficient state attention, puts state regulatory programs at risk which supervise through an ongoing program of oversight. Indeed the procedural rigidity demanded by the Commission in focus-

ing narrowly on pre-implementation state supervision of new rate filings appears to be useful principally as a means to subject the activity to federal antitrust liability, rather than to see that state regulatory policy is carried out.<sup>40</sup>

5. The Commission's decision makes clear in other ways as well its willingness to intrude on state regulatory discretion. The Commission accepted an argument suggesting that the staff of the Montana insurance department did not have the time to devote to rate review. (Pet. App. 75a.) Commissioner Strenio, the author of the majority opinion, opined (based upon his own prior "rate review experience" as a member of the Interstate Commerce Commission) that the Arizona insurance department had "no qualified personnel."<sup>41</sup> (Pet. App. 135a.) Indeed the

<sup>40</sup> In *Southern Motor Carriers* this Court acknowledged the legitimacy and usefulness of collective rate filing through rating bureaus as part of a system of state rate regulation. 471 U.S. at 51. The FTC in its petition nonetheless displays overt animosity to this state regulatory alternative, asserting that the present case involves "horizontal price-fixing" that is "even more dangerous [to society] than ordinary price fixing" because of a state agency's monitoring of the "cartel." Pet. at 20-21. This same bias against the States' regulatory choices was reflected in the FTC decision below, as was candidly admitted by Commissioner Azcuenaga in her separate opinion: "The majority's apparent distaste for state-regulated price-fixing, which I share, perhaps carries more weight than it should in the majority's analysis of active supervision." (Pet. App. 113a.)

The FTC Amici assert that the Respondents admit fixing prices in the States at issue. Amici at 2. This is incorrect. The Respondents admit that they have jointly filed rates for search and examination services through state authorized rating bureaus. Contrary to the implications of these Amici that there was a broader agreement among the Respondents, the ALJ expressly found in the record in this case "not a hint of any collusive rate making activity outside of the rating bureaus." (Pet. App. 247a.)

<sup>41</sup> Commissioner Strenio asserts that "[t]he absence of sufficiently trained personnel seems substantively equivalent to not having an 'adequate system of regulation.'" (Pet. App. 135a, n.18.) Dissenting Commissioner Azcuenaga observed that "the Commission should



free-wheeling approach applied by the Commission puts virtually no aspect of the State's regulatory organization or decisions beyond the scope of federal review under the active supervision requirement.

In sum, the practical, cumulative effect of the FTC's intrusive review of the merits of state regulation is a standard of active supervision that provides no guidance for future conduct and leaves private parties, who react in good faith to state regulation, at the mercy of inconsistent second-guessing by a federal antitrust tribunal. The factors which caused the Commission to arrive at its differing state-by-state results did not depend on the conduct of the Respondents, but rather upon the Commission's hindsight review of the action of the state regulators after the Respondents' rating bureau activities had occurred. The Third Circuit's rejection of the Commission decision on the grounds upon which it was rendered was clearly warranted.

#### IV. THE THIRD CIRCUIT DID NOT FAIL TO ACCORD PROPER DEFERENCE TO THE COMMISSION'S FINDINGS OF FACT.

The Commission wrongly contends that in finding active supervision to be present, the Court of Appeals "fail[ed] to accord proper deference to the Commission's findings of fact" by not "accepting the Commission's weighing of all the evidence and the credibility of witnesses." FTC Br. at 27-28. This argument mischaracterizes the nature of the Third Circuit's decision.

By its terms the FTC Act provides that "[t]he findings of the Commission *as to the facts*, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c) (emphasis added). Even the case principally relied upon by the Commission recognizes that this rule ends when appellate

decline to accept [Commissioner Strenio's] invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel." (Pet. App. 123a.)

review involves ascertaining and applying the correct rule of law: "[T]he identification of governing legal standards *and their application to the facts found*—are, by contrast, for the [reviewing] courts to resolve." *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (emphasis added).<sup>42</sup>

The Third Circuit here rested its decision on its rejection of the legal standard of active supervision applied by the FTC. It held that "[a]vailability of the state action doctrine does not depend upon the quality of state supervision" (Pet. App. 37a) and that the Commission erred in using the active supervision requirement to sit "in judgment upon the degree of strictness or effectiveness with which a state carries out its own statutes." (Pet. App. 32a, *quoting New England*, 908 F.2d at 1076 (emphasis omitted).) Having determined that the Commission applied an erroneous standard of active supervision, the Third Circuit properly reviewed the administrative record as a whole to determine that active supervision existed under the correct legal standard.

The extensive factual discussion in the Commission's brief (FTC Br. at 28-30) shows that the fact findings that it claims were disregarded by the Third Circuit were, in each case, criticisms of the quality of the programs in those two States. The Commission does not dispute the facts relied upon by the Third Circuit to find the *existence* of a regulatory program under the legal standard it applied,<sup>43</sup> but simply argues that those facts fail to show

<sup>42</sup> Indeed this Court has emphasized the responsibility of reviewing courts to closely evaluate agency decisions which involve "a judgment as to the proper balance to be struck between conflicting [legal] interests" because they "would abdicate their responsibility if they did not fully review such administrative decisions." *N.L.R.B. v. Brown*, 380 U.S. 278, 291-292 (1965).

<sup>43</sup> The FTC admits that the Court of Appeals "did not expressly overturn any of the Commission's findings of fact." FTC Brief at 28, 29.



that the Arizona and Connecticut regulatory programs achieved the *quality* that the FTC's preferred standard would require.

For example, the Commission acknowledges that the Third Circuit is correct that following the 1968 rate filing in Arizona, state officials "sought information as to how a component of the rates was derived." FTC Br. at 28. The Commission simply argues that this finding fails to measure up to its own legal standard, because it does not show that "state officials determined that respondents' rates were consistent with the State's substantive criteria." *Id.* Similarly, the FTC acknowledges that the Third Circuit "relied on testimony by a state official that Connecticut reviews every rate it receives,"—a fact showing the existence of a regulatory program—but gave insufficient attention to the FTC's criticism "that state officials did not supervise insurer expenses." *Id.* at 29-30.

The Commission has not shown that the Third Circuit failed to defer to any finding of fact by the agency. The Court of Appeals properly exercised its role as a reviewing court to determine the correct rule of law and apply the law to the facts disclosed by the record.

## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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**APPENDIX****SUBSIDIARIES (EXCEPT WHOLLY OWNED  
SUBSIDIARIES) AND AFFILIATES OF  
STEWART TITLE GUARANTY COMPANY**

The list of non-wholly owned subsidiaries and affiliates of respondent Stewart Title Guaranty Company included in the Appendix to Respondents' Brief in Opposition to the Petition for Certiorari remains current except for the additions and deletions listed below.

**Additions:**

Anchorage Title Company  
Bachman-Stewart Title Co.  
Fairbanks Title Company  
Landata of Kansas City  
Local Express  
Professional Real Estate Tax Service  
South Texas Delivery  
Star Courier  
Star Delivery, Inc.  
Stewart Title & Settlement Services Inc.  
Stewart Title Company of California  
Stewart Title Company of Riverside County  
Stewart Title of Central Nevada  
Stewart Title of Fairfax  
Stewart Title of Kansas City  
Stewart Title of Snohomish County  
Stewart-Fidelity Title Company  
Stewart-Princeton Abstract  
Stewart-West Coast Title

**Deletions:**

American Surveying of New England  
Environmental Information Systems

Intercounty Abstract Co. d/b/a Stewart Title of  
New Hampshire  
Island Title Exchange, Inc.  
Landata Inc. of New England  
Landmark Title, Inc.  
Meyerdirk Title Co. (Kansas)  
Stewart-Fidelity Title Company  
Stewart Metro Title Corporation  
Stewart of Bayshore  
Stewart-Princeton Abstract  
Stewart Tax Service  
Stewart Title Company of Michigan  
Stewart Title Co. of Palestine  
Stewart Title of Birmingham, Inc.  
Stewart Title of Central Jersey, Inc.  
Stewart Title of Columbia  
Stewart Title of Fort Lauderdale, Inc.  
Stewart Title of Greater Washington, Inc.  
Stewart Title of Indianapolis, Inc.



FOR ARGUMENT

**SHELF COPY**

No. 91-72

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

**SHELF COPY**

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

TO BE PRINTED

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23.12

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REPLY BRIEF FOR THE PETITIONER

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Society as a whole -- and consumers in particular -- will pay a high price if principles of federalism are extended beyond their proper bounds to immunize unreviewed private anticompetitive conduct at the expense of the "familiar and substantial \* \* \* federal interest in enforcing the national policy in favor of competition." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980). Respondents are seeking antitrust immunity for horizontal price-fixing. No antitrust offense is more "dangerous to society." FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 781 n.16 (1990) (quoting 7 P.

Areeda, Antitrust Law ¶ 1509, at 412 (1986)). See also United States v. Trenton Potteries Co., 273 U.S. 392, 396-398 (1927). Indeed, the price-fixing at issue here is particularly dangerous, because the state agency provides a convenient mechanism for monitoring and enforcing participation in a cartel. An overly permissive standard of "active supervision" threatens to abrogate the protections of the federal antitrust laws, and to leave consumers substantially unprotected, in a wide variety of industries, professions, and occupations that are subject to some state regulation.

1. Respondents and their amici persistently misstate the Federal Trade Commission's position in this case. As we explain in our opening brief (Pet. Br. 20), our contention is that the "active supervision" prong of the state action test requires "an affirmative determination by state officials that the particular private anticompetitive activity at issue is consistent with State policy." See also Pet. 14; Pet. App. 55a. In the context of this case -- which involves so-called "negative option" systems of regulation, under which private activity is "deemed" approved by state officials by operation of law unless it is disapproved within a specified period of time -- the mere fact that state officials do not object to private anticompetitive activity is not sufficient to demonstrate active supervision. Such regulatory silence is ambiguous, particularly where, as here, state officials have discretion to review, or not review, particular rates. The States' failure to object may reflect the State's determination that the

private activity at issue is consistent with state policy, or it may reflect nothing more than inaction by the State. Consequently, the relevant question for purposes of the state action doctrine is whether state officials have determined that the anticompetitive activity is consistent with state policy.

Rather than addressing the FTC's position, respondents attack a series of straw men. Respondents repeatedly assert (Resp. Br. 1, 20, 21, 26, 32) that the FTC's standard requires federal courts and antitrust agencies to evaluate the quality of decisionmaking by state officials. See also Hartford Ins. Co. Br. 5 (FTC evaluates the "rigor" of state supervision). That is not so. The FTC's legal standard turns on whether state officials have determined that the private activity at issue accords with state policy, not on the quality of the State's determination. Respondents themselves recognize this basic distinction by quoting (Resp. Br. 25) this Court's statement that "the issue is not whether 'the sovereign has acted wisely' but simply whether 'the state [has acted] as a sovereign.'" Hoover v. Ronwin, 466 U.S. 558, 574 (1984). Here, the FTC required only that the State act as sovereign. It is respondents who would expand the state action doctrine to confer antitrust immunity where the State has not acted at all.<sup>1/</sup>

<sup>1/</sup> Respondents' amici suggest (Hartford Ins. Co. Br. 15-16) that the distinction between informal review and approval by state officials and no review at all is insignificant. We disagree. Review of private conduct by state officials is essential to proper confinement of the scope of the implied exemption from the antitrust laws for state action.

We agree that federal courts and antitrust agencies should not scrutinize the quality of a State's determination that private anticompetitive behavior is consistent with the State's policies. See Hoover v. Ronwin, 466 U.S. at 574; 1 P. Areeda & D. Turner, Antitrust Law ¶ 213c, at 75 (1978). In this case, however, state officials did not make any such determination. See Pet. App. 60a-63, 76a. Indeed, Wisconsin and Montana, joined by 34 other States, have filed a brief in support of the FTC stating that "[i]n Wisconsin and Montana there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents." Wis. Br. 11 n.9. Accordingly, there is no occasion in this case "to examine the quality or 'meaningfulness' of state regulatory decisions." Ibid.<sup>2/</sup>

Similarly, respondents assert (Resp. Br. 34) that the FTC would "find[] active supervision only where the cop catches every miscreant and awards a gold star to every law abiding citizen." Respondents' colorful imagery is quite misleading. The legal standard applied by the FTC does not inquire into the quality of the State's determination, let alone its correctness. Consequently, it does not require the State to "catch[] every miscreant." Instead, it requires only that, to the extent private

<sup>2/</sup> Respondents attempt to minimize the significance of the States' brief in support of the FTC by asserting (Resp. Br. 38-39 n.37) that it is addressed solely to whether the Wisconsin and Montana clearly articulated a policy to displace competition. But as the statements quoted above demonstrate, the States' brief also forcefully takes the position that the States at issue did not actively supervise respondents' price-fixing. See Wis. Br. 8-9, 11, 14 & n.14, 17-22.



parties are left to police themselves, they are subject to the federal antitrust laws.

In yet another variation, respondents suggest (Resp. Br. 25-26 & n.21) that the FTC's test for active supervision turns on whether "the state's attempted exercise of its power is imperfect in execution under its own law." Quoting Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.). See also ALTA Br. 5-6 (FTC would "conduct[] a de novo review of state agency action and \* \* \* determine[] [whether] state regulators properly balanced the interests of state policy against the federal goals of unfettered competition"). Again, respondents misstate the FTC's position. The FTC, applying this Court's state action decisions, inquired whether state officials both have and exercise the power to review particular private anticompetitive actions and reject those that do not accord with the State's policies. So long as state officials have exercised their power to review the anticompetitive activity at issue, the fact that those officials may have committed procedural or substantive errors under state law is irrelevant. Nor does the active supervision test applied by the FTC require federal courts and antitrust agencies to determine whether state officials have properly balanced state policy interests against the federal policy favoring competition.<sup>2/</sup>

<sup>2/</sup> To support their mischaracterizations of the FTC's position, respondents and their amici rely on isolated statements in the FTC's opinion that the States' regulatory activity was not "meaningful," as well as on statements in the separate opinions of Commissioners Strenio and Azcuenaga. As we explain in our Reply Brief at the certiorari stage (Pet. Reply Br. 1-3), respondents' reliance, out of context, on the Commission's references to

2. a. Respondents make a determined effort to obscure the basic fact that, in each of the States at issue, state officials did not determine whether respondents' price-fixing was consistent with state policy. For example, respondents' lengthy (and one-sided) review of the evidence concerning Montana (Resp. Br. 13-16) fails to mention the FTC's key factual finding that respondents' rates "went into effect without being examined." Pet. App. 76a. In discussing Wisconsin, respondents go further and assert (Resp. Br. 41) that the FTC's decision "was not based on an absence of regulatory review and approval by the State." That is simply wrong. The Commission found that (1) respondents' 1971 rate filing remained in effect for years even though respondents had not submitted the data necessary to justify the rates, Pet. App. 60a-61a; (2) respondents' 1981 filing was checked only for mathematical accuracy, id. at 61a; (3) respondents' 1982 filing was "not even checked for accuracy," ibid.; (4) "nearly two dozen endorsements and amendments went into effect without being examined at all," id. at 63a, and (5) no hearing has ever been held in Wisconsin on any insurance rate, and no rate suspension order has ever been issued, id. at 60a. Wisconsin and Montana have filed a brief stating that,

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"meaningful" review is unjustified in light of the holding of the Commission that "the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." Pet. App. 55a. The short answer to respondents' reliance on the separate opinions of Commissioners Strenio and Azcuenaga is that they are not the Commission's opinion. Moreover, Commissioner Azcuenaga agreed with the Commission that "the active supervision requirement is satisfied only where a state official or agency has engaged in a 'substantive review' of the collective rate proposals." Pet. App. 111a.

in both States, "there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents."

Wis. Br. 11 n.9.<sup>4/</sup>

b. It is not surprising that state officials did not determine whether respondents' rates were consistent with state policy, because state law required no such determination. As Wisconsin and Montana (joined by Arizona and other States) explain (Wis. Br. 25-27 & nn.26, 27), state statutes give insurance regulators discretion to review, or not review, particular rate filings for compliance with the State's regulatory criteria.<sup>2/</sup>

<sup>4/</sup> Similarly, the FTC found, as to Arizona, that there was "no convincing evidence that [respondents'] rate was \* \* \* reviewed by the state," and that "the record is inconclusive as to the kind of review, if any," that minor rate filings received. Pet. App. 67a, 68a. As to Connecticut, the FTC found that crucial components of respondents' rates "were not being supervised at all," and that filings that did not involve generalized rate increases were "simply ignor[ed]." Pet. App. 56a, 60a.

<sup>2/</sup> See Mont. Code Ann. § 33-1-311(3) (J.A. 188) ("The commissioner may conduct such examinations and investigations \* \* \* as he may deem proper."); *id.* § 33-1-701(1) ("The commissioner may hold hearings for any purpose within the scope of this code deemed by him to be necessary."); *id.* § 33-1-317 (J.A. 191) ("The commissioner may, after having conducted a hearing pursuant to § 33-1-701, impose a fine."); *id.* § 33-1-318 ("Whenever it appears to the commissioner that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, he] may \* \* \* issue an order directing the person to cease and desist."); Wis. Stat. § 601.41(5) (J.A. 201) ("The commissioner may at any time hold informal hearings \* \* \* for the purposes of investigation"); *id.* § 601.43(1)(a) (J.A. 203) ("Whenever the Commissioner deems it necessary in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner may examine the affairs and condition of \* \* \* any person or organization of persons doing \* \* \* insurance business in this state."); *id.* § 625.21 ("If the commissioner finds that competition is not an effective regulator of rates \* \* \* he or she may promulgate a rule."). See also Ariz. Rev. Stat. Ann. § 20-365 (J.A. 166) ("Cooperation among rating organizations and insurers in rate making \* \* \* is authorized \* \* \* . The director

Thus, the court of appeals was incorrect in concluding (Pet. App. 30a, 33a, 34a, 36a) that state officials were required to reject any rates that did not meet the State's regulatory criteria.<sup>5/</sup> Indeed, respondents concede that "proposed rates in the four States at issue were effective if the state agency took no affirmative action to challenge the filed rate," and argue that unreviewed private conduct should be exempt from the antitrust laws if state regulators have chosen to allocate scarce resources to other matters that they deem more important. Resp. Br. 35 & n.31.

Respondents also concede (Resp. Br. 37) that "the existence of judicial review mechanisms alone" is not sufficient to meet the active supervision requirement, and they do not seriously defend the court of appeals' erroneous conclusion that consumers can obtain writs of mandamus in the States at issue. Respondents argue (*ibid.*), however, that the FTC failed to take account of "the

may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is \* \* \* inconsistent with the provisions of this article, he may issue a written order \* \* \* requiring the discontinuance of such activity or practice."; Conn. Gen. Stat. Ann. § 38-201x(2) (J.A. 184) ("A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner within the waiting period or any extension thereof.").

<sup>5/</sup> The statutes cited by the court of appeals and respondents provide only that rates shall not be excessive, inadequate, or unfairly discriminatory, that state officials shall see that the provisions of the insurance laws are faithfully executed, and that, if the state official determines, after a hearing, that a rate does not meet the State's criteria, the rate must be rejected. See Ariz. Rev. Stat. Ann. §§ 20-375(A), 20-376(D) (J.A. 167-168); Conn. Gen. Stat. Ann. §§ 38-4, 38-201p(b), 38-201x(b)(2) (J.A. 171, 178, 186); Mont. Code Ann. §§ 33-1-311, 33-16-205 (J.A. 188, 196); Wis. Stat. Ann. §§ 601.41(1), 625.22 (J.A. 201, 208)→ These general provisions do not require state officials to examine and approve or disapprove every rate. See Wis. Br. 25-27.



mechanisms for administrative and direct judicial review of rate review matters that are embodied in the statutes of all four States." But those provisions are not sufficient to satisfy the active supervision requirement, for two reasons. First, as the brief for Wisconsin and Montana explains (Wis. Br. 25-27), state officials have discretion to decide whether to grant a consumer's request to hold hearings on particular rates. The leading case holds that "the investigation of consumer complaints \* \* \* and the resulting action, if any, fall within the Commissioner's expressly-provided, discretionary powers." Gerber v. Commissioner, 242 Mont. 369, 786 P.2d 1199, 1200 (1990). The statutory provisions on which respondents rely do not require a hearing upon demand, but only if state officials determine that the consumer's complaint is supported by probable cause, made in good faith, or would "otherwise justify a hearing."<sup>2/</sup> It thus appears that an aggrieved consumer could obtain very limited, if any, judicial review of a state official's decision to deny a hearing. Respondents fail to cite a single case in which a court in one of the States at issue ordered an insurance regulator to grant a consumer's request to hold a hearing on a rate.

Second, and more fundamentally, even if the state statutes afforded consumers a right to a hearing on demand, such a right would not constitute active state supervision. As we explain in our opening brief (Pet. Br. 26-27), the active supervision

<sup>2/</sup> See Ariz. Rev. Stat. § 20-378(B) (J.A. 170-171); Conn. Gen. Stat. Ann. § 38-201p(a), (b) (J.A. 177-178); Mont. Code Ann. § 33-16-204 (J.A. 196-197); Wis. Stat. Ann. § 227.42.

requirement is not met where private parties are allowed to engage in anticompetitive activity, subject only to the possibility that consumers will bring costly litigation in order to obtain post hoc review by state officials.<sup>3/</sup>

3. This Court's state action decisions have emphatically indicated that private anticompetitive activity is not exempt from the federal antitrust laws unless state officials have determined that the activity accords with the State's policies. The Court has explained that the state action exemption from the federal antitrust laws applies only where "the State effectively has made [the anticompetitive] conduct its own." Patrick v. Burget, 486 U.S. 94, 106 (1988). Private parties are presumed "to further [their] own interests, rather than the governmental interests of the State." Id. at 100. Consequently, the state action doctrine does not immunize private anticompetitive conduct unless state officials both "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Id. at 101 (emphasis added).

Respondents incorrectly assert (Resp. Br. 29) that "no decision of this Court has ever found an absence of active supervision where there was state authority to engage in substantive review of the regulated private conduct." In 324

<sup>3/</sup> Because consumers cannot be assured of a hearing, the suggestion (Hartford Ins. Co. Br. 20 n.9) that the filed rate doctrine provides a "useful analogy" is unpersuasive. As amici themselves recognize, "[t]he theory underlying [that] doctrine is that interested parties should be required to press challenges to the validity of the rate before the body with the power and expertise to make the public interest determination." Ibid.



Liquor Corp. v. Duffy, 479 U.S. 335 (1987), the state agency had authority to alter the prices set by private parties in response to market conditions, by permitting wholesalers to depart from their posted prices or by permitting retailers to sell below "cost." Id. at 345 n.7. The Court nevertheless held that the active supervision requirement was not met because the agency did not "exert[] any significant control over \* \* \* prices." Ibid. See also Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) (finding absence of state action even though the state agency had authority to review the private activity at issue).<sup>2</sup>

Respondents criticize the standard applied by the FTC on the ground that private parties will be unable to predict or determine whether their conduct has been actively supervised by the State.

<sup>2</sup> Contrary to the assertion of respondents' amicus (Hartford Ins. Co. Br. 16-17 n.5), this Court has recognized that "analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to the state-action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment." NCAA v. Tarkanian, 488 U.S. 179, 194 n.14 (1988). To be sure, the Court said in Blum v. Yaretsky, 457 U.S. 991, 1004-1005 (1982), that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." But the kind of "approval" that the Court appeared to have in mind was precisely the type of passive acquiescence that is at issue in this case. In the antitrust context, as in the Fourteenth Amendment context, "[t]he purpose of [the state action] requirement is to assure \* \* \* that the State is responsible for the specific conduct of which the plaintiff complains." Id. at 1004. Thus, the state action doctrine requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). In light of these basic similarities, it would be odd if private action could be converted into state action for purposes of the antitrust laws without state approval, while even state approval of private action does not suffice for purposes of the Fourteenth Amendment.

Resp. Br. 26. Respondents' criticism rests primarily on their mistaken assertion that the FTC's standard involves post hoc federal review of the quality of state supervision. As we have explained, (p. \_\_, supra), however, it is the fact of state approval, not its quality, that matters. The standard applied by the FTC requires private parties to (1) identify the specific private conduct at issue, and (2) determine whether state officials have approved that conduct as consistent with state policy. The first requirement should pose no difficulty, and minimizes uncertainty about the scope of antitrust immunity. In many cases, the second requirement will also pose no difficulty. For example, there may be a written decision or other record of the state agency's action. Absent such a record, there is no reason why private parties should not bear the burden of contacting state authorities to determine whether their conduct has been approved. To be sure, private parties may not be able to predict with certainty whether such approval will be forthcoming, but that kind of uncertainty is inherent in the requirement that state officials both have and exercise the power to determine whether private anticompetitive activity is consistent with state policy. As leading commentators observe, where a private party wishes to avail itself of the state action exemption in order to engage in conduct that would otherwise violate the federal antitrust laws, it is not "inappropriate \* \* \* to instruct regulated firms that they cannot

count on antitrust immunity unless they invite and actually receive state supervision." 1 Areeda & Turner, supra, ¶ 213, at 79.<sup>10/</sup>

4. Respondents' effort to defend the court of appeals' "basic level of activity" test is unconvincing. Although respondents contend (Resp. Br. 31) that the court of appeals' test properly balances "the federalism principles underlying the state action doctrine and the evidentiary purpose of the active supervision requirement," in fact the test serves neither principles of federalism nor the antitrust goal of promoting competition. As some of respondents' amici candidly recognize, the court of appeals' test invites federal courts and antitrust agencies to conduct an unfocused inquiry into the full range of the State's regulatory actions. ALTA Br. 6. Moreover, because the

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<sup>10/</sup> The court of appeals decisions respondents cite (Resp. Br. 29 & n.24) do not support their contention that the active supervision requirement is satisfied by the mere "existence of a statutory system of regulation." In Capital Telephone Co. v. New York Telephone Co., 750 F.2d 1154 (2d Cir. 1984), cert. denied, 471 U.S. 1101 (1985), the court of appeals agreed with the district court's determination that the State's regulatory program provided for "comprehensive ongoing involvement by the state in the functioning of telephone corporations." 750 F.2d at 1163. Moreover, both the court and the dissenting judge noted that in practice the State investigated and determined the rates. Id. at 1164, 1168. In Llewellyn v. Carothers, 765 F.2d 769, 773 (9th Cir. 1985), most of the challenged conduct was of two state officials, rather than private parties. And the court found that the private activity at issue was "mandated" by the government. Id. at 775. In Marrese v. Interqual, Inc., 748 F.2d 373 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985), the court found that the state agency "reviews the \* \* \* determinations of medical peer review committees." 748 F.2d at 390. Although the court did not address whether review had actually occurred in that case, it was clear that the plaintiff had short-circuited the state review procedures by filing a federal antitrust action. Moreover, the Ninth Circuit later concluded (Patrick v. Burget, 800 F.2d 1498, 1506 (1987), rev'd, 486 U.S. 94 (1988)) that the statutory scheme at issue in Marrese was "nearly identical" to the scheme at issue in Patrick.

court of appeals' test does not specify the amount or type of activity that suffices to meet the "basic level" standard, it provides little guidance to private parties or federal courts. Id. at 7.<sup>11/</sup>

Apart from those shortcomings, the fatal defect in the court of appeals' legal standard is that it confers antitrust immunity on private conduct that state officials have not determined to be consistent with state policies. As respondents themselves recognize (Resp. Br. 23), the active supervision requirement serves the "evidentiary function" of "ensuring that the [private] actor is engaging in the challenged conduct pursuant to state policy." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985). Respondents candidly acknowledge (Resp. Br. 35) that the court of appeals' standard would allow "proposed [private] action to become effective without affirmative approval." Absent evidence of a determination by state officials, however, there is no evidence that anticompetitive conduct furthers state policies, and private parties can be expected to act to further their own interests rather than the public interest. See Town of Hallie, 471 U.S. at 47. "The national policy in favor of competition cannot be

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<sup>11/</sup> The court of appeals' application of its test suggests that, in that court at least, almost any activity by state officials will do. Respondents assert (Resp. Br. 31 n.26) that mere inaction or passive acquiescence on the part of state officials would not be sufficient to pass the "basic level of activity" test. But the court of appeals found a "basic level of activity" in Wisconsin and Montana even though it did not question the FTC's findings that Wisconsin and Montana did not review respondents' rates. It thus appears that the court of appeals would be satisfied by a "basic level of activity" that is unrelated to the rate filing at issue.

thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 324 Liquor, 479 U.S. at 345 (quoting Midcal, 445 U.S. at 106).

5. Some of respondents' amici would reject the court of appeals' test in favor of a "structural" approach to active supervision that looks solely to the regulatory framework established by state statutes. See AIA Br. 24-30; ALTA Br. 7; Hartford Ins. Co. Br. 11. Respondents themselves do not propose a "structural" test, and it is even less satisfactory than the court of appeals' standard.

A pure "structural" test would transform the requirement that state officials "have and exercise" the power to supervise private anticompetitive activity, Patrick, 486 U.S. at 101, into a requirement that state officials merely have such power, whether or not it is exercised. It is settled that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." Parker v. Brown, 317 U.S. 341, 351 (1943); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344, 1353 (1991). Consequently, the States cannot confer antitrust immunity simply by enacting a statute (other than a self-executing statute). They must actually displace competition with "an adequate system of regulation," 324 Liquor, 479 U.S. at 345 (emphasis added), that actively supervises private anticompetitive conduct. As discussed below (p. \_\_, infra), we agree that a statutory requirement that state officials review particular private conduct is persuasive

evidence that such review actually occurred. But it is actual supervision by state officials, not theoretical supervision provided for by statute, that provides assurance that private anticompetitive activity is consistent with the State's policies.<sup>12/</sup>

A "structural" approach to active supervision would inevitably bog the federal courts down in litigation over whether particular regulatory systems satisfy the active supervision requirement. As the federal courts developed a catalog of structures that did or did not pass muster, they would "limit" the States' regulatory options in precisely the way that respondents and their amici accuse the FTC of limiting regulatory options. Rather than evaluating the States' entire regulatory structure for compliance with federal norms, it is simpler and less intrusive -- and much more pertinent -- for federal courts and agencies to inquire whether state officials have reviewed and approved the particular private conduct at issue.<sup>13/</sup>

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<sup>12/</sup> Because state officials had no duty under state law to review every rate filing, respondents and their amici err in relying on the "presumption of regularity" in this case. In any event, as respondents recognize (Resp. Br. 30 n.25), the presumption of regularity is rebuttable. See INS v. Miranda, 459 U.S. 14, 18 (1982) (per curiam); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). Here, the FTC found that state officials did not review respondents' collective rates. Thus, even if a presumption of regularity were applicable in this context, it would be rebutted.

<sup>13/</sup> Respondents' amici assert (Hartford Ins. Co. Br. 14) that the regulatory systems at issue here are similar to federal rate regulation schemes that are understood to displace the antitrust laws. But there is a crucial distinction between express legislation by Congress applicable to a particular sector of the economy and the judicially implied exemption of Parker v. Brown. As Professors Areeda and Turner have noted,



In any event, the regulatory systems at issue here would not pass a "structural" test, because they give state officials discretion to review, or not review, rates. Respondents' amici are incorrect in asserting (Hartford Ins. Co. Br. 13, 14) that the "regulatory system described in Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985), is essentially identical to those in the present case" and is "a prototype of active supervision." In Southern Motor Carriers, the States' regulatory agencies consistently held hearings and determined whether the private conduct at issue met the State's standards. See United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 476 (N.D. Ga. 1979). Consequently, the government conceded that the active supervision requirement was met. 471 U.S. at 62. Here, in contrast, the state agencies did not make such determinations. Indeed, in at least one State (Wisconsin), the state agency has never rejected a rate or even held a rate hearing. See Pet. App. 60a. Thus, the regulatory systems at issue in this

At the national level, Congress can and has been understood to displace the antitrust laws for a particular industry or practice with a regulatory regime, such that objections to the private behavior are to be handled by the regulators and not by the antitrust courts. [See, e.g., United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975).] \* \* \* And, of course, Congress may do so with respect to state regulatory regimes as well \* \* \*. But the idea of Parker immunity, based as it is on implication rather than on express direction, seems to require actual state approval.

1 P. Areeda & D. Turner, supra, ¶ 213f, at 78.

case differ sharply from those at issue in Southern Motor Carriers, even if the statutes bear a family resemblance.<sup>14/</sup>

6. Respondents and their amici assert that the legal standard applied by the FTC is inconsistent with principles of federalism. The brief of Wisconsin, Montana, and Arizona, joined by 33 other States, refutes that assertion. Those States agree that if no state official "specifically reviewed the anticompetitive conduct at issue, \* \* \* there can be no state action immunity." Wis. Br. 11. That result is fully consistent with principles of federalism. Where the State has not reviewed and approved private conduct, it is not "truly the government," rather than "the regulated private entities, which is replacing competition with regulation." Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 (1982) (Rehnquist, J., dissenting).<sup>15/</sup>

<sup>14/</sup> This case does not present the question whether the active supervision requirement is met where state officials review some, but not all, private anticompetitive activity. The Commission found no active supervision in the States at issue even though it concluded that "it would not be incumbent upon a respondent to show that every single piece of data filed with a rate commission was reviewed." Pet. App. 54a. Instead, the Commission "look[ed] at the review activity as a whole and [sought] to determine whether there was a general program of supervision -- not whether each and every rate was reviewed." Ibid.

<sup>15/</sup> California, joined by three other States, has filed a brief arguing that principles of federalism require federal courts and antitrust agencies to defer to state regulation "where States meet objective standards signifying the displacement of competition." Cal. Br. 11. California also argues that "it is the fact of supervision" that determines whether the active supervision requirement is met. Id. at 16. In this case, however -- as Wisconsin, Montana, Arizona, and 33 other States recognize -- the States did not meet the objective standard for active supervision, because they did not in fact review or approve respondents' price-fixing.

Respondents incorrectly contend (Br. 34) that the standard of active supervision applied by the FTC would reduce the range of regulatory options available to the States by requiring "[v]isible, affirmative determinations, in advance, by state officials that planned private conduct comports with state policy." In particular, there is no basis for the suggestion (Penn. Elec. Ass'n Br. 4; Cal. Br. 7) that the FTC's standard would require the States to adopt the procedures of the federal Administrative Procedure Act. The standard applied by the FTC does not confine the States' choice of procedures for determining whether private conduct is consistent with state policy. On the contrary, the FTC expressly rejected complaint counsel's argument that the State's determinations must follow a "standard loosely based upon the Administrative Procedure Act." Pet. App. 58a n.9. Because the standard of active supervision applied by the FTC is satisfied by informal review procedures, predictions of regulatory "gridlock" (Penn. Elec. Ass'n Br. 17) are grossly overstated. It is true that forms of state regulation that do not result in a determination that particular private conduct is in accord with state policy will not confer antitrust immunity on private anticompetitive conduct. But that type of "limitation" on state regulatory options is inherent in the active supervision requirement. This Court's

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California's intimations (Br. 11-12) that the standard applied by the FTC is unconstitutional are wholly unfounded. Although Parker is based on a reluctance to attribute to Congress "an unexpressed purpose to nullify a state's control over its officers and agents," Parker v. Brown, 317 U.S. 341, 350-351 (1943), no decision of this Court has ever suggested that the Parker immunity for the conduct of private parties is constitutionally required.

decisions in Midcal, supra, 324 Liquor, supra, and Patrick, supra, each imposed such a limitation.<sup>16/</sup>

Respondents' amici are off the mark in asserting (Hartford Ins. Co. 20-21) that the standard applied by the FTC, based on this Court's decisions, is judicially unmanageable. The question whether state officials have approved particular private conduct is not beyond the competence of federal courts or antitrust agencies. Where the state agency has issued a written decision or order, the answer should be obvious. Where there is no such written evidence, it should be relatively easy to answer the question in most cases on the basis of other evidence, including statements from state officials. We agree with respondents and their amici that the fact that officials are required by state statute to make such a determination is relevant to determining whether they made such a determination in a particular case. In this case, however, state officials were not required to make such

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<sup>16/</sup> Indeed, 36 States forcefully argue that adopting the court of appeals' active supervision standard would actually limit the States' regulatory choices, by making it difficult for the States to adopt modest regulatory programs that rely in part on competition. Wis. Br. 15-16. Respondents' amici may be correct in arguing (Hartford Ins. Co. Br. 23) that "[a] State that does not want to invoke Parker need only make clear in the governing statute that it does not intend to prescribe a different policy." But it would be quite burdensome for state legislatures to add such provisions to all regulatory statutes (including the large body of regulatory statutes already in existence). Such an approach would require state legislatures to "consciously consider" the anticompetitive effects of regulation in order to avoid the possibility of unintentionally creating antitrust immunity. Ultimately, of course, the scope of implied immunity must be determined by interpreting the federal antitrust laws themselves, not by a State's failure to declare that those laws have not been superseded.

a determination, and the FTC found that state officials had not in fact determined that the rates at issue were consistent with state policy. See Wis. Br. 11 & n.9, 25-27.

7. Finally, respondents contend (Resp. Br. 46-48) that the court of appeals did not fail to defer to the FTC's findings of fact as to Arizona and Connecticut, but instead applied the correct legal standard to the facts as found by the FTC. In our opening brief, we explain (Pet. Br. 27-31) that the court of appeals disregarded the Commission's findings that there was no convincing evidence that respondents' 1968 rate filing was reviewed by Arizona officials, that Connecticut officials did not supervise some crucial elements of respondents' rates at all, and that Connecticut officials ignored rate filings that did not involve generalized rate increases.

Respondents make no effort to argue that, despite these factual findings, the court of appeals was entitled to conclude that state officials reviewed and approved the rates at issue. Instead, respondents argue (Resp. Br. 47) that the FTC's findings were no more than "criticisms of the quality of the programs in those two States," and so were properly disregarded by the court of appeals.

Respondents' argument misses the point. If the court of appeals was correct in holding that active state supervision does not require state officials to determine that private anticompetitive activity is consistent with state policy, then of course it makes no difference that the court of appeals failed to

defer to the Commission's findings that Arizona and Connecticut did not make such determinations. But if, as we submit, active supervision does require such a determination, then the court of appeals' failure to defer to the FTC's findings is significant and warrants reversal.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR  
Solicitor General

JANUARY 1992



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No. 91-72

Supreme Court, U.S.  
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In The  
Supreme Court of the United States

October Term, 1990

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE STATES OF WISCONSIN,  
ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE  
IDAHO, IOWA, FLORIDA, KENTUCKY, LOUISIANA, MAINE,  
MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,  
MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE,  
NEW JERSEY, NEW YORK, NORTH CAROLINA,  
NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE  
ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA,  
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In The  
Supreme Court of the United States  
October Term, 1990

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FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., et al.,

*Respondents.*

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BRIEF OF AMICUS CURIAE IN SUPPORT OF  
PETITIONER

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The States of Wisconsin, Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming (hereinafter "Amici States") submit this brief in support of the Federal Trade Commission's position that the judgment of the United States Court of Appeals for the Third Circuit in *Ticor Title Insur. Co. v. F.T.C.* (hereinafter *Ticor*), 922 F.2d 1122 (3d Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991), should be reversed. Reversal is warranted because the court of appeals departs from this Court's precedents and adopts a standard that undermines state antitrust enforcement as well as state regulation.

## INTEREST OF THE AMICI STATES

Respondent insurers concede that they fixed prices. They admit that these price-fixing agreements were unfair and anticompetitive within the meaning of section 5 of the FTC Act. *Ticor*, 922 F.2d at 1124. Immunizing such price-fixing agreements strikes at the heart of state antitrust enforcement. Upholding immunity in this case would limit the ability of states to choose regulatory policies that rely on competitive markets, rather than pervasive regulation, to determine prices.

The Amici States have an important interest in preserving their authority in our federal system to regulate in accordance with the needs of their citizens. Whether this regulation has completely or only partially displaced competitive markets, this Court has traditionally respected the sovereignty of the states to choose regulatory policy. The lower court's decision, however, jeopardizes the states' ability to implement regulatory approaches that rely on competitive markets to meet state goals. The ruling appealed from permits private, financially interested parties to escape antitrust liability even though their anticompetitive conduct has never been reviewed by any state regulator.

The state regulatory regimes at issue here explicitly direct that the insurance commissioners of Montana and Wisconsin rely on the competitive marketplace to determine prices rather than regulate rates directly.<sup>1</sup> Unwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct

<sup>1</sup> See, e.g., Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1991).

under federal antitrust law or state insurance law. The attorneys general have a vital interest in maintaining the integrity of the process by which insurance transactions are accomplished. The novel exemption fashioned by the court of appeals invites price fixing by insurers in all lines of insurance despite clear state statutory language mandating reliance on competition in such markets.

Finally, as the chief law officers of their states, the attorneys general are charged with the duty of enforcing the antitrust laws. They are the primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law.<sup>2</sup>

The attorneys general also represent their states and, in most cases, their political subdivisions in federal antitrust actions for damages and injunctive relief. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of the citizens of their states.<sup>3</sup> As the principal public enforcers of the state antitrust laws and as representatives of the primary victims of the anticompetitive conduct encouraged by the lower court's opinion, the state attorneys general have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying

<sup>2</sup> E.g., *Carl N. Swenson Co. v. E.C. Braun Co.*, 272 Cal. App.2d 366, 77 Cal. Rep. 378, 379-80 (1969); *State v. N.J. Trade Waste Ass'n*, 96 N.J. 8, 19, 472 A.2d 1050, 1055 (1984); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966). See also Mont. Code Ann. § 30-14-104 (1989); Utah Code Ann. § 76-10-926 (1991).

<sup>3</sup> 15 U.S.C. § 15(c) (1989); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972).



congressional policy, this Court's past decisions, and sound public policy.

The attorneys general are frequently forced to evaluate the need for antitrust enforcement in industries that may be subject to some degree of state oversight. Expanding antitrust immunity as the Third Circuit has done would seriously impair antitrust enforcement in general.

The Amici States support the Federal Trade Commission's position that the state action doctrine does not immunize the price-fixing agreements at issue here.

#### STATEMENT OF THE CASE

The Amici States adopt and subscribe to the statement of the case presented by the Solicitor General and the Federal Trade Commission in their opening brief to this Court as to the four states which are the subject of this

appeal.<sup>4</sup> As a supplement to that statement, the Amici States provide the following background information.

Wisconsin and Montana require insurers to give "notice" to the insurance commissioner of the rates they charge. Mont. Code Ann. § 33-16-203(1) (1991); Wis. Stat. § 625.15 (1989-90). An insurer may discharge this obligation by developing its own cost data or by relying upon a filing by a licensed rate service organization ("rating bureau"), with "such modification for its own expense and loss experience as the credibility of that experience allows." Mont. Code Ann. § 33-16-203(1) (1991); Wis. Stat. § 625.15(1) (1989-90). Rating bureaus are permitted to exist to make more efficient the collection and pooling of claims and expense data against which individual insurers can price their product on a competitive

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<sup>4</sup> The Federal Trade Commission rejected, on the basis of extensive findings of fact, the state action defense of the title insurers as to six states, Wisconsin, Montana, Arizona, Connecticut, New Jersey and Pennsylvania. *Ticor*, 922 F.2d at 1126. The court of appeals reversed and vacated the decision of the Federal Trade Commission. As to Pennsylvania and New Jersey, the FTC has not appealed the lower court's conclusion that there is no failure of the first prong of the state action test; also, as to those two states, the FTC stipulated that active supervision was present. However, while the FTC chose to seek review by this Court of the decision of the court of appeals with respect to Wisconsin and Montana, the implications of the court of appeals' erroneous decision range far beyond Wisconsin and Montana and, indeed, far beyond the insurance industry. In addition, the FTC has sought more limited review of the court of appeals' decision with respect to Arizona and Connecticut. Although not addressed in this brief for the sake of brevity, the Amici States also support the FTC's position with respect to Arizona and Connecticut.

basis. Mont. Code Ann. § 33-16-202(2)(3) (1991); Wis. Stat. § 625.01 (1989-90).<sup>5</sup>

Insurers are expected to decide, unilaterally, what rates they will charge based upon "average expense factors determined by the rate service organization or with such modification for its own expense and loss experience as the credibility of that experience allows." *E.g.*, Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1991).<sup>6</sup> The relevant statutes recognize that the ability of each title insurer to compete on price will depend on its ability to control not only the "riskiness" of its customer base, but also its administrative expenses and its costs of searching and examining the titles it chooses to insure.<sup>7</sup>

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<sup>5</sup> Pooling data regarding the number and type of claims enables insurers, regulators and consumers to predict the frequency and amount of claims ("the risk premium") expected under an insurance policy.

<sup>6</sup> The clear articulation prong of the *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97 (1980), analysis is not at issue in this case with respect to the pooling and filing of rating information permitted by the state statutes. However, state regulatory policies were not designed to displace all competition in markets for such non-insurance services such as searches and examinations of titles. Instead, Wisconsin and Montana articulated policies *relying* on competition to determine title insurance rates. In any event, it is clear that no regulator in Wisconsin or Montana ever reviewed the filed information to determine if it comported with state policy and no regulator ever reviewed the price fixing of the respondents.

<sup>7</sup> The FTC rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from FTC review under section 2(b) of the (continued...)

The Montana and Wisconsin statutes "presume" that the markets in which insurers make these business decisions are competitive.<sup>8</sup> Consequently, Montana and Wisconsin allow unreviewed, collectively-formulated rates to be used prior to filing. *Ticor*, 922 F.2d at 1139-40. In addition, the insurance regulators in Montana and Wisconsin are not required to hold a hearing or to examine the filings. *See, e.g.*, Wis. Stat. §§ 601.41(5) and 601.43(1) (1989-90); *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 786 P.2d 1199 (1990).

In the present case, the regulators in Montana and Wisconsin did no more than (1) receive submissions for filing; (2) check some of them for mathematical accuracy;

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<sup>7</sup>(...continued)

McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1989), *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,452-22,459 (F.T.C. 1989), and that respondents' price fixing was protected under the *Noerr-Pennington* doctrine. *Id.* at 22,469-60. These issues are not before this Court.

<sup>8</sup> "On the whole, the insurance market is fairly competitive, and attention directed to making it more so will be more rewarding than effort directed to the regulation of particular rates." Wis. Stat. Ann. § 625.01 (West 1980) (Committee Comment 1969). "It is the express intent of this chapter to permit and encourage competition between insurers on a sound financial basis, and nothing in this chapter is intended to give the commissioner power to fix and determine a rate level by classification or otherwise." Mont. Code Ann. § 33-16-101 (1991). Consistent with this "express intent," the insurance departments of these two states are limited to a reactive posture because their state statutes presume that insurance markets are operating competitively, Wis. Stat. § 625.11(2)(a), (1989-90), or that rates cannot be found excessive if competition is present, Mont. Code Ann. § 33-16-201(1)(b) (1991).

and (3) make certain inquiries regarding geographic scope and supporting data. Many inquiries went unanswered at all, or unanswered for several years. *Ticor*, 922 F.2d at 1139-40 n.16.

### SUMMARY OF ARGUMENT

The attorneys general ask the Court to reverse the decision of the court of appeals for the following reasons:

1. For anticompetitive conduct to be immune under the State action doctrine, it must be undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. It also must be "actively supervised by the state." *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 105 (1980). Active supervision means that the States "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94 (1988) (emphasis added). The court of appeals, however, adopted a rule that "some basic level of [regulatory] activity" would be sufficient to meet the active supervision prong of the state action defense. *Ticor*, 922 F.2d at 1136.

The court of appeals' decision should be reversed not simply because it conflicts with long-standing precedent of this Court, but because it undercuts the ability of the states to use their regulatory agencies to implement narrowly tailored, rather than pervasive, regulatory schemes. The same state statutes which authorize joint filing, expressly presume and provide that competition will determine title insurance rates and search and examination fees. These narrowly-tailored state policies were adopted against a backdrop of a national policy

favoring competition. If not reversed, the lower court's standard will jeopardize the cooperative federalism embodied by this Court in the state action doctrine.

2. The insurance departments of Montana and Wisconsin did not review filings of the title insurers because they operated under the presumption that the insurance markets in question were operating competitively. The filings of rating bureaus are required to provide notice to regulators of rates that may be charged. Such filings, however, did not and do not eliminate the statutory obligation of individual insurers to establish competitive rates based on their own experience and costs. Agreements among insurers to charge specific prices are explicitly prohibited by state law. Far from being reviewed by state regulators, the agreements by title insurers to fix the fees they charge for searches and examinations, and to file rates jointly based in part on those fixed fees, subverted state regulatory schemes by making market-driven rate review impossible.

In acquiescing to the rates filed, the states did not authorize the price fixing which preceded the filing. See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 554 n.26 (1978). State acquiescence in one activity (i.e., the filing of pooled rating information) is not state approval of a related but distinct activity (i.e., classic horizontal price fixing).

3. The court of appeals' decision to grant state action immunity appears to be based, in part, upon the court's misperception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for active state supervision. *Ticor*, 922 F.2d at 1139-40. The extent to which the lower court's misperception constituted an independent basis for its



decision is unclear. It is clear, however, that mandamus cannot substitute for active state supervision. Putting the burden on *consumers* rather than on state officials to initiate review of the anticompetitive conduct directly contravenes the standard and rationale for state action immunity. In any event, in Wisconsin and Montana, mandamus cannot remedy the price-fixing conduct or compel state officials to exercise their discretion in any way that would affect the rates.

## ARGUMENT

### I. THE CIRCUIT COURT'S STANDARD UPSETS THE CAREFULLY-DRAWN BALANCE BETWEEN THE STATES' RIGHT TO CHOOSE REGULATORY SCHEMES AND THE NATIONAL POLICY FAVORING COMPETITION.

This Court has embodied basic principles of federalism and state sovereignty in the state action doctrine. *E.g.*, *Parker v. Brown*, 317 U.S. 341 (1943); *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97 (1980) (hereinafter *Midcal*). The court of appeals' deviation from well-established decisions of this Court jeopardizes the cooperative federalism between federal antitrust law and state regulation this Court has carefully constructed and limits state regulatory choices.

### A. The test applied by the lower court conflicts with long-standing precedent of this Court.

This Court has repeatedly stated that before private parties regulated by the states may enjoy immunity from federal antitrust liability, such parties must satisfy a two-pronged test: First, the conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. Second, the anticompetitive conduct must be "actively supervised by the state." *Midcal*, 445 U.S. at 105. Active supervision means that the states "*have and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added).

Applying this Court's "active supervision" test here is a relatively easy task: No regulator in Wisconsin or Montana specifically reviewed the anticompetitive conduct at issue and, hence, there can be no state action immunity.<sup>9</sup> The court of appeals, however, ignored this controlling precedent and substituted the following standard:

Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to

<sup>9</sup> In Wisconsin and Montana there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents. Hence, this Court need not examine the quality or "meaningfulness" of state regulatory decisions (Respondents' Brief in Opposition to Petition for Certiorari at 5, 6-7).

declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

*Ticor*, 922 F.2d at 1136 (quoting *New England Motor Rate Bureau, Inc. v. F.T.C.*, 908 F.2d 1064, 1071 (1st Cir. 1990) (hereinafter *NEMRB*)).

The court of appeals, thus, adopted what amounts to little more than a "bodies, buildings and budget" standard by which state action is to be measured. The mere presence of a state regulator involved in some basic level of activity could immunize private price fixing. The crude approach to the active supervision prong adopted by the lower court abrogates the fundamental principles of state sovereignty. Specifically, it undercuts the ability of states to use their regulatory agencies to implement partial, rather than pervasive, regulatory policies.

**B. The lower court's standard undermines the system of cooperative federalism embodied in the state action doctrine.**

The state action doctrine rests "on principles of federalism and state sovereignty." *City of Columbia v. Omni Outdoor Advertising*, \_\_\_ U.S. \_\_\_, 113 L.Ed.2d, 382, 391 (1991). See also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987). Under such principles, this Court protected the right of a state to adopt a comprehensive regulatory scheme, even though that scheme had a profound, adverse effect on competition, where state officials, not private parties, determined the nature of the

restraint. *Parker v. Brown*, 317 U.S. 341 (1943).<sup>10</sup> Consistent with these same principles, the Amici States ask no more than that this Court protect the states' right to adopt less-than-comprehensive regulatory schemes that use competition as the key component of regulatory policy.

Permitting private parties to immunize their price fixing through use of state statutes *promoting* rather than displacing the federal policy favoring competition would contravene the state action doctrine and our system of "cooperative federalism." Just as states can adopt exquisitely comprehensive regulatory schemes displacing every vestige of competition, states should be able to regulate loosely or just monitor markets, relying on competition to govern market conduct.<sup>11</sup>

Here, Wisconsin and Montana attempted to fine-tune their insurance regulatory schemes to permit efficiency-enhancing joint activity--the pooling of experience data

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<sup>10</sup> In *Parker*, California's regulatory scheme directly contravened the national policy favoring competition. State policy sought to enhance prices received by in-state producers who shipped 95 percent of their raisin output in interstate commerce. 317 U.S. at 359. The plaintiff in *Parker* claimed that he had been irreparably injured by the state's displacement of competition. *Id.* at 349.

<sup>11</sup> In *Midcal* and *324 Liquor*, this Court denied state action immunity to private parties. There the states authorized price fixing by private parties and enforced participation in the scheme but did not supervise the actual setting of prices. Here, Wisconsin and Montana explicitly ban agreements to adhere to prices, only allow minimal joint filings from which individual insurers are free to deviate and have not reviewed the filings regarding search and examination fees to determine if they are in compliance with state policies.

and the joint filing of rating information.<sup>12</sup> At the same time, these states mandated that insurers make independent decisions regarding the prices they would charge. The same statutes required insurance regulators to presume that insurance markets operated competitively.<sup>13</sup> Thus, the regulatory schemes in place in Wisconsin and Montana (a) provide for competition to determine the actual level of rates and, consequently, (b) do not provide for active oversight of the competitive price-setting process. Largely because of this conscious state policy to use competitive markets to determine rates, Wisconsin and Montana regulators adopted a "hands-off" policy toward title insurance, especially as it related to non-insurance components such as search and examination services.<sup>14</sup>

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<sup>12</sup> Section II, below, details the passive regulatory policies in Montana and Wisconsin.

<sup>13</sup> Wis. Stat. § 625.11(1) (1989-90); Mont. Code Ann. § 33-16-201(1)(b) (1991). This presumption would apply with added force regarding prices for items which are not part of the business of insurance, such as search and examination services.

<sup>14</sup> The rates for these services were not reviewed at all. Wisconsin regulators stated that they had never examined the title insurance rating bureau, never had a hearing on any insurance rate filing in any line of insurance, never issued a rate suspension order, did not have the resources to review rates and, in general, "followed a hands-off policy in dealing with title insurers." *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744, at 22,446 (FTC 1989) (quoting testimony of Wisconsin regulators).

In addition, a key Wisconsin official testified that the department did not have any idea what an efficient company's

(continued...)

Respondents exhibited blatant disrespect for state policy when they concealed their private price-fixing scheme behind minimal "notice" filings. Thus, the court of appeals immunized price fixing that directly conflicted with the states' explicit reliance on competition.

The court of appeals' test would thwart attempts by state legislators to rely on the federal policy favoring competition when they fashion narrowly tailored regulatory schemes. Instead of promoting federalism, the state action doctrine as enunciated by the lower court would prevent states from exercising their sovereignty.

### C. The lower court's standard limits state regulatory choices.

The court of appeals' approach would *limit* rather than expand the states' regulatory choices. Private parties in many industries subjected to "some basic level of [regulatory] activity" could hereafter claim that they are entitled to the defense of state action immunity from federal antitrust liability. Almost every industry is subject to state oversight on some level, by at least one state agency. The range of state oversight extends from the licensing of entrants into professional services markets, *see generally*, Mont. Code Ann. Title 37, *et seq.* (1991); Wis. Stat. ch. 440, *et seq.* (1989-90), to the regulation of every aspect of the ratemaking activities of public utilities; Mont. Code Ann. Title 69 (1991); Wis. Stat. ch. 196 (1989-90), with a myriad of regulatory gradations in between.

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<sup>14</sup>(...continued)  
expenses would be for search and examination services even though such information was necessary to regulate such charges.  
*Id.*



Frequently, the states regulate certain aspects of an industry's operation while allowing unmonitored marketplace competition to determine many, if not most, economic decisions.

The "buildings, bodies and budget" test promulgated by the lower court impairs the states' ability to devise regulatory policies that use the market as a means to enhance efficiency and consumer welfare. Several states which have adopted innovative approaches to insurance regulation that rely explicitly on a judicious mix of competition and regulation.<sup>15</sup>

A fundamental concept of modern economics is that the appropriate role of government is to establish the laws that make it possible for markets to operate competitively.<sup>16</sup> Wisconsin and Montana attempted to implement this idea with their rating-bureau statutes. The Amici States request this Court to respect their policy in its application of the state action doctrine.

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<sup>15</sup> For example, New Jersey recently passed the Fair Automobile Insurance Reform Act of 1990 (the FAIR Act) which both repealed the state antitrust exemption for the automobile insurance industry and adopted provisions that prohibit insurers from using rating organizations for any purpose other than with respect to historical loss data. 1990 N. J. Sess. Law Serv. Ch. 8, §§ 70, 69 (West).

<sup>16</sup> See generally R. Coase, "The Problem of Social Cost," 3 J.L. & Econ. 1 (1960).

## II. THE CIRCUIT COURT'S DECISION MISAPPREHENDS THE INSURANCE REGULATORY SCHEMES OF MONTANA AND WISCONSIN.

Having *understated* the level of state involvement needed to invoke state action immunity, the lower court proceeded to *overstate* the degree of regulatory oversight actually used in Wisconsin and Montana. The joint filings by title insurance rating bureaus are primarily informational and do not supplant the obligation of individual companies to set rates competitively. The court of appeals erred in stating: "Once the title insurance rating bureau establishes *the uniform rate* for search and examinations services in a certain state, the insurance companies that are members of the bureau charge this rate for these services." *Ticor*, 922 F.2d at 1129 (emphasis added). The Montana and Wisconsin statutes explicitly prohibit agreements among insurers to charge any particular rate or fee. Indeed, in Wisconsin, a proposal in the late 1970's to cap search and examination fees failed because the insurers were "inalterably opposed" to active rate regulation.<sup>17</sup>

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<sup>17</sup> In April, 1975, the Wisconsin Department of Insurance held a hearing on a proposed title insurance rule (Donohoe 1634-37; RX 320C-E). This proposed rule would have required, among other things, specific data to be submitted as justification for title insurance rates, and would have set a maximum on the amount that title insurers could charge for conducting a title search and examination (Donohoe 1634-37; RX 320C-E). The insurers belonging to the Wisconsin Rating Bureau were "inalterably opposed" to the two requirements of the proposed rule (Donohoe 1639; RX 326-326A). The rule was not promulgated by the Wisconsin Department (Donohoe 1640, 1653).

**A. Montana and Wisconsin do not review title search and examination fees.**

The statutes in Montana and Wisconsin rely upon competition to set title insurance rates and, consistent with that reliance, do not provide for active review of the filed "notices" of rates. Far from condoning price fixing, the insurance statutes of Wisconsin and Montana *explicitly prohibit* agreements among insurers to use or adhere to the published rates. *E.g.*, Wis. Stat. § 625.33 (1989-90); Mont. Code Ann. § 33-16-303 (1991).<sup>18</sup>

Montana's and Wisconsin's reliance on competition, rather than regulation, to set rates and related expenses is underscored by the Committee Comment to the 1969 revisions to the Wisconsin insurance statutes, which states: "Of course, a competitively oriented rating law such as this one will not provide for active regulatory intervention to ensure what this section directs, but it sets the standard and relies mainly on competition to achieve the goal." Wis. Stat. Ann. § 625.15 (West 1980) (Committee Comment 1969). *See also* Mont. Code Ann. § 33-16-101(2) (1991).<sup>19</sup>

<sup>18</sup> The 1969 Committee Comment dealt with this issue explaining: "*Rates may be made individually or collectively by bureaus, but agreements to adhere to bureau rates are prohibited.*" Wis. Stat. Ann. ch. 625 (West 1980) (Committee Comment at 5) (emphasis added).

<sup>19</sup> Indeed, the underlying premise of the 1969 revisions in Wisconsin's rating bureau statute underscores the emphasis the state placed on insurer competition to set rates, not direct regulation: "The existing [much more rigid and comprehensive] system of rate regulation has been rendered unnecessary through the development of a strikingly greater degree of  
(continued...)

The powers of the insurance departments of both Wisconsin and Montana are limited because their state statutes presume that insurance markets are operating competitively, Wis. Stat. § 625.11(2)(a) (1989-90), or that rates cannot be found excessive if competition is present. Mont. Code Ann. § 33-16-201(1)(b) (1991). Wholly apart from these specific provisions, state regulatory agencies must operate in a manner which maximizes competition.<sup>20</sup>

The Wisconsin Legislature's move to the new system in 1969 was premised on the assumption that insurance markets operate competitively. Consistent with this premise, the statutes provide that: "Insurers can use the rates they choose. No approval is required, and a filing is required only for information and after the fact." *Id.* The Wisconsin Legislature recognized that laws and market forces other than those put into place by the new rating

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<sup>19</sup>(...continued)

meaningful price competition in many of the most important lines of insurance." Wis. Stat. Ann. ch. 625 (West 1980) (Committee Comment 1969). The Wisconsin legislators concluded that this change in industry attitudes and practices together with enumerated defects in "[r]ate regulation in the traditional manner," "call for a system of rate control which eliminates the requirement that rates be reviewed by the commissioner before use." *Id.*

<sup>20</sup> For example, Wis. Stat. § 133.01 (1989-90), provides:

It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature.

system would operate to prevent collusion in rate-setting by individual insurers.

Given the laissez faire structure of insurance rate regulation described above, it is understandable why Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees. The regulators relied on competition to determine rates because their state insurance statutes mandate that competition, not the regulators, shall determine actual market rates.

**B. The price fixing would have made rate review impossible.**

The figures reported for search and examination fees on the rate filings reflected *price-fixed* search and examination fees, not a compilation or average of fees each company expected to incur. Because price fixing distorted the market price for the search and examination services, state regulators could not have reviewed the reasonableness of these rates on a state-specific basis had they chosen to do so.

The statements that insurers in Wisconsin and Montana are required to file with their respective insurance commissioners, see Wis. Stat. § 625.15 (1989-90); Mont. Code Ann. § 33-16-203 (1991), must include information regarding risks, expenses and profits. See Wis. Stat. § 625.12 (1989-90); Mont. Code Ann. § 33-16-201 (1991). State law presumes that insurers incur costs and expenses in a competitive marketplace. See, e.g., Wis. Stat. § 625.11 (1989-90); Mont. Code Ann. § 33-16-201 (1991).

Any attempt to determine whether or not rates or fees are excessive must include a comparison of the filed rates with rates and fees charged by insurers in the competitive market. If search and examination fees have been artificially inflated, excessive rates can be made to appear acceptable. Distorting the market for search and examination services thereby impairs any attempt to review the performance of insurers. Indeed, the passive regulatory structure and performance in Wisconsin and Montana, as outlined by both the court of appeals and the FTC, *Ticor Title Insur. Co.*, 5 Trade Reg. Rep. (CCH) ¶ 22,744 at 22,446, 22,450-51 (F.T.C. 1989), is common and reflects the reliance of the states generally on competitive markets for determining the level of title insurance rates.

As in *St. Paul v. Barry*, 438 U.S. 531, 554 n.26 (1978),<sup>21</sup> Wisconsin and Montana did not, by acquiescing in the informational or "notice" filings, authorize the fixing of search and examination fees. *Id.* at 554 n.26. State acquiescence in one activity (i.e., the filing of pooled rating information) is not state review, much less approval, of a separate and distinct activity of classic horizontal price fixing regarding the underlying expenses in that filing. See generally, *In re Insurance Antitrust Litig.*, 938 F.2d 919 (9th Cir.), *reh'g denied*, \_\_\_ F.2d \_\_\_ (9th Cir. 1991); *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810 (11th

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<sup>21</sup> In *St. Paul*, the Court assumed that policy form changes desired by insurers had been filed with the state insurance director. However, even though Rhode Island acquiesced to the filing of these policy forms, there was no indication that Rhode Island had "authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *Id.* Hence, even though the state had received and approved the policy forms at issue in *St. Paul*, state action immunity was not available to the defendant insurers there.



Cir. 1990); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988).

The respondent insurers have failed to provide any evidence that the relevant states supervised or approved the agreement to fix title search and examination fees. Further, that price-fixing conspiracy was neither a reasonable nor a necessary consequence of filing collective rate schedules. In fact, the collusion would have subverted effective rate review had it been attempted. Private parties who subvert the regulatory process ought not to enjoy immunity from otherwise unlawful acts because they have defeated the objective of the process. Accordingly, the respondent insurers' agreement to fix search and examination fees is neither state action nor entitled to be immune from federal antitrust regulation.

### III. THE EXTRAORDINARY WRIT OF MANDAMUS CANNOT SUBSTITUTE FOR EFFECTIVE STATE SUPERVISION.

The court of appeals' decision to grant state action immunity is based, in part, upon the court's perception that the extraordinary writ of mandamus is available to consumers and that its availability obviates the need for *active state* supervision. *Ticor Title Ins. Co. v. F.T.C.*, 922 F.2d 1122, 1139-40 (3d Cir. 1991), *reh'g denied*, 922 F.2d 1141 (3d Cir. 1991). The court of appeals' reliance on mandamus both contradicts the sound policy that this Court has previously articulated and misapprehends state law.

#### A. Placing the burden of enforcing state policy on consumers circumvents the policy underlying the state action doctrine.

The availability of mandamus does not constitute *active state* supervision. Active state supervision ensures that the state action doctrine shelters only the particular anticompetitive acts of private parties which actually further state regulatory policies. *E.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). In this case, the hypothetical possibility that consumers will seek and obtain judicial review, if it "exists at all, falls far short of satisfying the active supervision requirements." *Patrick v. Burget*, 486 U.S. 94, 104 (1988).

Even if mandamus were appropriate,<sup>22</sup> mandamus cannot transform passive state supervision into active supervision. Mandamus simply shifts the burden of enforcing state policy from state regulators to private litigants.<sup>23</sup> The court of appeals did not consider that a private litigant has neither the ability nor the incentive to shoulder this burden of mandamus litigation. Federal and state antitrust laws provide treble damage recovery for

<sup>22</sup> As discussed below, mandamus is inappropriate where, as here, state law requires the state official to exercise discretion and judgment.

<sup>23</sup> The Wisconsin attorney general lacks the ability to seek and obtain an extraordinary writ of mandamus compelling the insurance commissioner to review title insurance rates in any particular fashion. *See, e.g.*, *Estate of Sharp*, 63 Wis. 2d 254, 217 N.W.2d 258 (1974). Thus, the court of appeals' decision necessarily places the burden of enforcing state policy upon private litigants.

parties injured by antitrust violations, but rules regarding mandamus afford no such remedies. See 15 U.S.C. § 15 (1989); Wis. Stat. § 133.18 (1989-90); Mont. Code Ann. § 30-14-133 (1991). Treble damages provide private litigants with an incentive to supplement governmental enforcement of the antitrust laws. See *Gerol v. Arena*, 127 Wis. 2d 1, 377 N.W.2d 618 (Ct. App. 1985). Relief through mandamus provides no such incentive. See, e.g., *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 100 (1981); *State ex rel. Butte Youth Serv. Center v. Murray*, 170 Mont. 171, 173-74, 551 P.2d 1017, 1019 (1976). Indeed, a successful mandamus petition provides nothing more than prospective relief.<sup>24</sup>

By placing the duty to enforce state policy in the hands of consumers while removing the incentives provided by antitrust statutes, the court of appeals seriously weakens the policies and protections underlying the "active state supervision" requirement. To jeopardize the national policy promoting competition in favor of such a gauzy cloak of state involvement runs counter to sound policy and would abrogate the state action doctrine. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987); *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. at 105.

<sup>24</sup>See Mont. Code Ann. § 33-16-211 (1991) and Wis. Stat. § 625.22 (1989-90). Setting forth remedies of import to private litigants, each statute authorizes the respective insurance commissioner to prohibit the future use of violative rating schemes.

**B. Mandamus is inappropriate to compel the insurance commissioner to perform a discretionary act.**

The remedy of mandamus is drastic, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967). Mandamus is unavailable to compel action when the duty to act is not clear and unequivocal and where the decision to act requires the exercise of discretion. See, e.g., *Law Enforcement Standards Bd.*, 101 Wis. 2d at 494, 305 N.W.2d at 100; *Butte Youth Serv.*, 170 Mont. at 173-74, 551 P.2d at 1019.<sup>25</sup>

In Montana, the insurance commissioner maintains the discretion to investigate insurance rates and determine whether further action is warranted. *Gerber v. Comm'r of Ins. of State*, 242 Mont. 369, 372, 786 P.2d 1199, 1201 (1990). Following an extensive review of the Montana code,<sup>26</sup> the *Gerber* court determined that the insurance

<sup>25</sup> The court of appeals itself cites *Law Enforcement Standards Bd.*, neglecting, however, to address the restrictive guidelines set forth above. *Ticor*, 922 F.2d at 1140

<sup>26</sup> E.g., Mont. Code Ann. § 33-1-311(1) (1991): "[T]he commissioner MAY conduct such examinations and investigations . . . as [she] may deem proper"; Mont. Code Ann. § 33-1-701(1) (1991): "[T]he commissioner MAY hold hearings for any purpose within the scope of this code deemed by [her] to be necessary"; Mont. Code Ann. § 33-1-317 (1991): "[T]he commissioner MAY after having conducted a hearing pursuant to § 33-1-701, impose a fine"; Mont. Code Ann. § 33-1-318 (1991): "[W]henever IT APPEARS TO THE COMMISSIONER that a person has engaged in or is about to engage in an act or practice constituting a violation of [this act, she] MAY . . . issue an order directing the person to cease and desist." Mont. Code (continued...)

commissioner's investigative and prosecutorial discretion rivaled that of a prosecutor and warranted quasi-judicial immunity from forced action via a writ of mandamus. *Id.* Accordingly, a writ of mandamus would not issue to compel his performance of discretionary acts.

Wisconsin has similarly placed certain powers within the discretion of the insurance commissioner.<sup>27</sup> Where authority is combined with specific grants of discretion similar to the Wisconsin statutory scheme, a regulator's discretion to investigate is very broad. *See, e.g., Vretenar v. Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714 (1988) (municipal officers). *See also Gerber*, 242 Mont. at 372, 786 P.2d at 1201 (insurance commissioner).

Failing to recognize the discretionary nature of the insurance commissioner's power, and the impropriety of a writ of mandamus to compel these discretionary duties, the court of appeals erroneously concluded that mandamus was a proper mechanism to force "active state supervision."

<sup>26</sup>(...continued)

Ann. (1991) as cited in *Gerber*, 242 Mont. at 369, 786 P.2d at 1199 (all emphasis from opinion).

<sup>27</sup> *See, e.g., Wis. Stat. § 601.41(5)* (1989-90): "The commissioner MAY at any time hold . . . hearings . . . for the purposes of investigation . . . ." *Wis. Stat. § 601.43* (1989-90): "WHENEVER THE COMMISSIONER DEEMS IT NECESSARY in order to inform himself or herself about any matter related to the enforcement of chs. 600 to 647, the commissioner MAY examine the affairs and condition of . . . any person or organization of persons doing . . . insurance business in this state . . . ." *Wis. Stat. § 625.21* (1989-90): "IF THE COMMISSIONER FINDS that competition is not an effective regulator of rates . . . he or she MAY promulgate a rule." (Emphasis added.)

*Ticor*, 922 F.2d at 1139-40. The Third Circuit Court of Appeals' opinion is, therefore, based on a flawed premise and must be reversed.

## CONCLUSION

For the foregoing reasons the decision of the lower court should be reversed.

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1991

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FEDERAL TRADE COMMISSION,  
*Petitioner,*

v.

TICOR TITLE INSURANCE CO., INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

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INTEREST OF AMICUS CURIAE

The Pennsylvania Electric Association ("PEA") is a trade association of investor-owned electric utilities operating in the Commonwealth of Pennsylvania. PEA's eleven member companies produce and distribute 98% of the electric energy consumed in Pennsylvania and serve 95% of the State's population.<sup>1</sup>

Each of PEA's members is a public utility subject to the pervasive regulation and supervision of the Pennsylvania Public Utility Commission. As such, they

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<sup>1</sup> PEA's members include: Citizens' Electric Company; Duquesne Light Company; Metropolitan Edison Company; Pennsylvania Electric Company; Pennsylvania Power & Light Company; Pennsylvania Power Company; Philadelphia Electric Company; Pike County Light and Power Company; UGI Corporation; Wellsboro Electric Company; and West Penn Power Company.

have a strong and continuing interest in the standards for state action immunity from the federal antitrust laws. Further, one of PEA's members is now the defendant in an antitrust action, *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, No. 91-CV-5176 (E.D. Pa. filed Aug. 12, 1991), which raises issues under the state action doctrine.

The Petitioner in the instant action, the Federal Trade Commission ("FTC"), has determined that the "active supervision" prong of the state action doctrine requires a showing that the State "has acted affirmatively to review and approve" the challenged private conduct, and in its Petition and Brief it now asks this Court to so rule. Pet. 12; Pet. Br. 5. Such a ruling would cause a fundamental change in existing law which would disrupt the system of State regulation of *amicus curiae*'s members and would unfairly subject them to antitrust attack for past conduct which has served important State policies and has been actively supervised by the State. Accordingly, PEA submits this brief *amicus curiae* in support of neither party to assist the Court in its resolution of the proper legal standard for state action immunity.<sup>2</sup>

#### STATEMENT OF THE CASE

*Amicus curiae* adopts the statement of the case set forth in the court of appeals opinion. 922 F.2d 1122; Pet. App. 1a-40a.

<sup>2</sup> Pursuant to Rule 36.2 of this Court, PEA has obtained the written consent of the petitioner and respondents to the filing of this brief *amicus curiae*. Copies of the letters setting forth such consent have been filed with the Clerk.

#### SUMMARY OF THE ARGUMENT

"The ultimate issue [in this case] is the meaning of the 'active state supervision' requirement in the context of the state action doctrine. . . ." Pet. Br. 2. The FTC held below that "the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." Pet. App. 55a. In its Petition for Writ of Certiorari, the FTC argued that: "This Court should grant certiorari to make clear that the 'active supervision' prong of the state action exemption requires a showing that the State 'has acted affirmatively to review and approve' challenged private conduct." Pet. 11-12.

The FTC's proposed new rule should be rejected for three reasons:

**First**, requiring affirmative review and approval as a condition to state action immunity would effectively turn the doctrine upside down. This Court has long recognized that the state action doctrine is based on principles of federalism. In recent years, the Court has often applied these principles to reject attempts to impose formalistic restrictions on the doctrine. The guidance provided by these decisions supports the rejection of the FTC's proposed test as well. See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

As the FTC's proceedings in this case demonstrate, the proposed rule would transform the "active supervision" prong of *California Retail Liquor Dealers*

*Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), into an issue of fact for trial. This would embroil the FTC and the federal courts in the trial of State regulators to determine for themselves whether the State looked hard enough at the matter and engaged in what the FTC called a "meaningful examination." Pet. App. 59a.

Not only would such a rule destroy the federalism basis for the doctrine, but by adopting this test, the Court would in essence be commanding the States to follow the federal Administrative Procedure Act as a condition to immunity under the federal antitrust laws. Any State agency which failed to do so—and thus provide formal, written reviews, approvals and determinations for every action—would find its programs open to antitrust attack.

In addition, by forcing regulated parties to litigate State regulatory matters to the fullest in order to perfect an "affirmative review and approval" immunity defense, the proposed rule would cause regulatory "gridlock." The States depend on voluntary compliance with their regulatory programs. Under the FTC's proposed rule, voluntary compliance would increasingly be displaced by lengthy administrative litigation in order to achieve the required "affirmative review and approval."

Further, like the "compulsion" test the Government proposed and this Court rejected in *Southern Motor*, requiring formal State orders would likely increase the number of State-sponsored restraints on free market competition. If the State must now command each private act through issuance of a formal determination and order, then it will no longer be able to adopt

permissive programs in which it encourages and supervises, but does not command.

**Second**, contrary to the FTC's argument, the prior decisions of this Court do not require formal review and approval in order to demonstrate active supervision by the State. In each of the prior decisions denying state action immunity on the basis of inadequate supervision by the State, the State had no statutory authority or responsibility to regulate the challenged conduct. See, e.g., *Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Midcal*.

Here, in contrast, the States have the authority and responsibility to oversee the challenged fees. In such cases, examining the States' exercise of that power too closely will destroy the very federalism that is the basis for the doctrine. In addition, such federal scrutiny of the exercise of State regulatory action is essentially boundless. Further, in the vast majority of State activities, the States have actually supervised the regulated parties as effectively as their federal counterparts, if not more so.

**Third**, changing the law to require such formal approval would create unjustified uncertainties and unfairly expose State programs to antitrust attack for prior conduct which satisfied the *Midcal* test. This Court has long respected established legal doctrines because of the strong public interest in predictability. This interest is even weightier where, as here, Congress has acquiesced in the established rule. Moreover, such a change would expose hundreds of State regulatory programs, and thousands of private regulated parties, to antitrust attack for past conduct which served State policies and was actively super-



vised, but which was never "affirmatively reviewed and approved."

### ARGUMENT

#### I. REQUIRING THE STATE "AFFIRMATIVELY TO REVIEW AND APPROVE" EACH CHALLENGED ACT OF REGULATED PARTIES WOULD TURN THE STATE ACTION DOCTRINE UPSIDE DOWN.

The key to the state action doctrine is the recognition that the State's power to engage in regulation of its domestic commerce is deserving of federal judicial respect under our principles of federalism and state sovereignty. It is these principles which undergird the doctrine. As this Court first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), and has reiterated many times since, with Congress' acquiescence:<sup>3</sup>

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

*Id.* at 351.

Over the past fifteen years, this Court has been called upon many times to clarify the line between "State" and "private" action. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,

<sup>3</sup> In adopting the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, Congress implicitly acquiesced in the state action immunity doctrine. See, e.g., S. Rep. No. 593, 98th Cong., 2d Sess. 5 (1984).

445 U.S. 97 (1980), the Court articulated the now-familiar two-pronged test:

First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

*Id.* at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The Government's position in this case would seem to be rebutted by the words of the test itself. If the Court had intended to require that "the State agency has acted affirmatively to review and approve" the challenged conduct, it could easily have said so and thereby avoided many years of litigation under both prongs of the *Midcal* rule. That the Court did not do so is important both for what it suggests the test was intended to mean, and for its reflection of the policies underlying the doctrine.

In litigation under the *Midcal* test this Court has consistently rejected restrictive and mechanical glosses. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), for example, the Court rejected the Government's proposed "inflexible 'compulsion requirement,'" holding that:

The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it

encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

*Id.* at 61.

Similar reasoning applies to the present effort to narrow the scope of *Midcal*'s active supervision prong. Requiring the State "affirmatively to review and approve" and formally "to determine" that every act of a regulated party is consistent with State policy would: (a) destroy the federalism basis for the doctrine, (b) cause regulatory "gridlock," and (c) increase rather than decrease the number of State-sponsored restraints on competition.

**A. Requiring Formal Review and Approval Would Destroy The Federalism Basis For The Doctrine.**

The Court has consistently relied on our principles of federalism as the basis for the state action doctrine. Last term, for example, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), the Court refused to impose a requirement that the challenged municipal zoning be free from "substantive or even procedural defect[s]" under state law. *Id.* at 1349. In doing so, the Court expressed its concern that the doctrine not be interpreted in a manner which "undermin[es] the very interests of federalism it is designed to protect." *Id.* at 1350.

What are these principles of "federalism" which remain so vibrant that they can influence this Court's application of the federal antitrust statutes? Perhaps

the most eloquent statement is that of Justice Black writing for the Court in *Younger v. Harris*, 401 U.S. 37 (1971), about "Our Federalism:"

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

*Id.* at 44.

These principles are particularly applicable when federal courts review State regulatory programs under the federal antitrust laws. See, e.g., *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 68 (1982) (Rehnquist, J., dissenting). "For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

From its first application to the California raisin stabilization plan in *Parker*, through the recent series of cases applying and refining the *Midcal* test, the Court has repeatedly drawn on "Our Federalism" for guidance in shaping the state action doctrine. The

resolution of these controversies has turned on this Court's judgment about how far federal antitrust interests should be advanced without "unduly interfer[ing] with the legitimate activities of the States." *Younger*, 401 U.S. at 44.

To be certain, this is not a bright line; but it is an extremely important one. Fortunately, we have a number of recent examples in which this Court has applied these principles of federalism to refine the state action doctrine. These cases, we submit, serve as guideposts for applying "Our Federalism" to decide the present controversy.

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), for example, the Towns challenged the City's refusal to provide sewage services unless the Towns agreed to be annexed. The Towns claimed that the state action doctrine could not apply unless the State had expressly recognized the potential anticompetitive consequences of its statutory scheme. Rejecting this argument, the Court reasoned that:

Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

*Id.* at 44 n.7.

The same reasoning applies to the FTC's proposed new test. Where States have the authority and re-

sponsibility to act, "[r]equiring such a close examination of a state[s]" **exercise** of its powers would intrude too far on the State's regulatory prerogatives. *Id.* If immunity depended upon the determination by a federal court or agency that the State had adequately reviewed and approved each challenged act, then the federal courts and agencies would become embroiled in the trial of State regulators to second-guess whether the State had engaged in a "meaningful examination." Pet. App. 59a. The trial below exemplifies precisely this type of intrusion since it involved the direct testimony and cross-examination of six State officials (*see* Pet. App. 140a n.2) as well as the examination of many official State documents (*see, e.g.*, J.A. 91-99, 108-113, 120, 124, 129, 132-134, 138-139, 143-148, 150-152).

Lower courts and commentators have recognized that the federal agencies and courts "should not scrutinize the rigor with which the state supervises the challenged activity" (*New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1076 n.18 (1st Cir. 1990)), because by doing so, "[i]nstead of being a doctrine of preemption, allowing room for the state's own action, [the state action doctrine] would become a means for federal oversight of state officials and their programs." *Id.* at 1071. In addition,

"[t]here simply is no way to tell if the state has 'looked' hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a 'public interest' judgment in order to determine whether the legislature or agency decision was correct. Those



are political judgments and ought to be made by the legislature and its delegates."

*Id.* at 1076 n.18. (quoting P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978)).<sup>4</sup>

Yet, that is precisely what the FTC seeks to do in this case. Indeed, in its brief to this Court, the FTC argues that state action immunity is an ordinary question of fact for trial, and that the lower court should have deferred to the Commission's fact findings. Pet. Br. 27. Under the Government's approach, unless clarified by this Court, there will likely be a flurry of state action immunity trials like that below. As in *Town of Hallie*, such a process will not only burden the courts, but undermine the federalism basis for the doctrine.<sup>5</sup>

<sup>4</sup> This Court has long recognized that the federal courts are not authorized to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Similarly, the federal courts do not sit as a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

<sup>5</sup> At least one lower court has held that: "The purpose of the state action doctrine is to avoid needless waste of public time and money." *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986). As a result, the court held that denial of state action immunity was an appealable interlocutory order under the doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In reaching this result, the court concluded that state action immunity is intended, like the qualified immunity for governmental action under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to provide "immunity from suit rather than a mere defense to liability." *Hillsborough*, 801 F.2d at 1289 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). For this reason as well, the FTC's pro-

In *Southern Motor*, the Court again drew on "Our Federalism" to reject the argument that immunity should be available only when "'necessary in order to make the regulatory Act work.'" 471 U.S. at 74 (quoting *Silver v. New York Stock Exch.* 373 U.S. 341, 357 (1963)).

In [the] context [of federal regulatory restraints], if the federal courts wrongly conclude that an antitrust exemption is "unnecessary," Congress can correct the error. As the dissent recognizes, however, the Supremacy clause would prevent state legislatures from taking similar remedial action. Moreover, the proposed test would prompt the "kind of interference with state sovereignty . . . that . . . Parker was intended to prevent."

*Id.* at 58 n.21 (citation omitted).

The same reasoning requires the rejection of the FTC's proposed test. Like determinations of the "necessity" of the State rule, federal court determinations of whether there was a "meaningful examination" (Pet. App. 59a) by State officials would—as the record in this case clearly shows—prompt the kind of interference with State sovereignty that *Parker* was intended to prevent.

In *Southern Motor*, the Court also rejected the Government's claim that immunity should be available only when the challenged conduct is compelled by the State. Again drawing on "Our Federalism," the Court

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posed rule should be rejected because it would require trial to resolve the immunity issue itself.

concluded that such a rule "reduces the range of regulatory alternatives available to the State." 471 U.S. at 61. The FTC's proposed rule in this case goes even further than the Government's compulsion argument in *Southern Motor*. It would effectively restrict State regulatory activity to formal review and approval proceedings, eliminating less formal encouragement and permissive systems no matter how actively supervised by State officials.

The elimination of permissive state regulatory systems would unquestionably "reduce[] the range of regulatory alternatives available to the State." *Id.* For example, in 1983, the Pennsylvania Public Utility Commission determined "to encourage [electric utility] investment in energy supply alternatives such as conservation, load management and alternate energy supply projects" and declared that "[i]t is not our intent, at this time, to dictate what specific programs or projects are to be implemented by the electric utilities. . . ." 13 Pa. Bull. 3222, 3223 (Oct. 22, 1983). Rather, the Public Utility Commission required detailed annual reports and evaluations of each of these programs under a Commission-mandated benefit-cost test. 14 Pa. Bull. 4514, 4515 (Dec. 15, 1984). The very purpose of this approach was to "provide the necessary flexibility in program development, while enabling the Commission and all interested parties to evaluate specific conservation programs for specific utilities." 13 Pa. Bull. at 3224.

Utility conservation initiatives developed under this State program would qualify for state action immunity under the *Midcal* test because they serve a clear State policy and are actively supervised by the State. Under the FTC's proposed "affirmative review and

approval" test, however, they may well fail because the State provides no mechanism for formal State approval of each program.

In *Omni*, the Court rejected yet another proposed restriction on the state action doctrine because of "Our Federalism." This time it was argued that procedural or substantive irregularities in the City's regulation of billboards should disqualify it from state action immunity. Rejecting this assertion, the Court explained that:

"We should not lightly assume that [the state action doctrine's] authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an indiscriminating and mechanical demand for 'authority' in the full administrative law sense."

111 S. Ct. at 1350 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b at 145 (Supp. 1989)). With respect to the "authority" prong of the *Midcal* test, the Court applied our principles of federalism to allow a broader basis for the States to act:

We . . . believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

*Id.*

This same reasoning applies to the FTC's contention here. If state action immunity is now to be re-

stricted to situations in which the State agency chooses to act through formal review, approval and a published determination, the very basis of *Parker* immunity will be destroyed. Potential antitrust liability for parties regulated by the State will now turn on "an indiscriminating and mechanical demand" (111 S. Ct. at 1350) for formalistic procedures and orders, much the same as the formalistic demand for "authority" which this Court rejected in *Omni*.

In *Omni*, the Court was also confronted with the argument, much like that advanced by the Government here, that the federal antitrust courts should themselves regulate State agencies by reviewing their actions to root out conduct which is "not in the public interest" or is in some sense "corrupt." 111 S. Ct. at 1352. In rejecting this contention as well, the Court explained that:

*Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.

*Id.* As the Court reasoned, if such judgments were "made subject to *ex post facto* judicial assessment of 'the public interest, . . . we will have gone far to 'compromise the States' ability to regulate their domestic commerce.'" *Id.* (quoting *Southern Motor*, 471 U.S. at 56).

The States' regulatory capacity would be similarly compromised were the Court to adopt the Government's argument in this case. If the state action doc-

trine is to turn on the requisite degree of formality associated with the States' regulatory actions—that is, whether they reflect affirmative, formal review, approval and published determinations—then the FTC will have succeeded in imposing the federal Administrative Procedure Act on the States as a matter of federal antitrust law.

This characterization is not as fanciful as it may seem. At the trial below, the FTC's complaint counsel argued that immunity turned on the existence of State procedures—modeled on the federal Administrative Procedure Act—for notice, development of an agency record, and judicial review. Pet. App. 237a-238a. Such a requirement is every bit as intrusive on the "States' ability to regulate their domestic commerce" as is the public interest standard rejected in *Omni*. It would effectively "conscript state utility commissions [and other state regulators] into the national bureaucratic army." *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part).

Accordingly, the FTC's proposed rule should be rejected because it would destroy the federalism basis for the state action doctrine.

#### B. Requiring Formal Review and Approval Would Cause Regulatory "Gridlock."

In a nation of 250 million people, it is not enough that the States are free to formulate policies for their own domestic commerce. In order for these policies to be effective, the States must be able to rely on widespread, voluntary compliance with their regulatory initiatives. There are obviously not enough resources available, much less hearing rooms in the



State agencies, to undertake formal administrative action in every case. As the commentators have recognized, the State seeks "ungrudging compliance . . . and voluntary participation in its regulatory structures." I P. Areeda & D. Turner, *Antitrust Law* ¶ 217, at 109 (1978).

If the regulated parties believe they risk being caught in the "jaws" of State regulatory policy and antitrust treble damages, then their ungrudging compliance with the State regulatory program obviously will be chilled. *Cf. Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984) (threat of damages will deter voluntary participation). In these circumstances, they will undoubtedly feel constrained to challenge many more State regulatory initiatives in order to generate the full record necessary for immunity.

If regulated parties are forced to protect themselves in this manner, then many State agency proceedings will be transformed into a lawyer's marathon of protest and appeal which would stymie the "States' ability to regulate their domestic commerce" as effectively as the reversal of *Parker* itself.

In Pennsylvania, for example, the Public Utility Commission regulates approximately 5,000 public utility entities providing electricity, natural gas, telephone, telegraph, water, sewage, steam, transportation and pipeline services. Pennsylvania Public Utility Commission, *1989-90 Annual Report* at 2. During its 1990 fiscal year, the Commission conducted proceedings for 59 fixed utility rate cases, 194 audits, 11 management audits, 7,978 consumer complaints, 8,290 mediation requests, 27,000 motor carrier inspections, and 41,000 freight car inspections. *Id.* at 1. During this time period, the Commission

issued 9,198 Orders, 4,332 reports, heard more than 50,000 pages of testimony and "filed and docketed" more than 130,000 documents. *Id.*

Looking at the national pattern of proceedings for State utility commissions, a similarly large case load appears. Of the twenty-five States reporting on utility commission proceedings concluded during 1990, the average per State was 1,120.2 formal proceedings. NARUC, *Annual Report on Utility and Carrier Regulation* at 941 (1990). Of the thirty States reporting on the number of customer and other complaints processed in addition to commission proceedings, the average was 4,411.4 per State in 1990 alone. *Id.* Assuming that the non-reporting State commissions have similar dockets, State utility commissions conducted approximately 276,580 complaint and other proceedings during 1990.

The potential for regulatory "gridlock" in the States' regulation of utilities alone is significant. If only 20% of these proceedings were antitrust-sensitive, and regulated parties requested formal hearings in those proceedings because of this changed state action rule, State utility commissions would face more than 55,000 additional formal hearings each year. In normal economic times, this new load would cause regulatory "gridlock" by anyone's definition. In the present financial circumstances of the various States, it would likely cause a regulatory disaster.<sup>6</sup>

<sup>6</sup> *Amicus* has been unable to locate hard data with respect to the number of proceedings conducted by other State regulatory agencies during 1990, such as those responsible for environment, land use, health care, education, agriculture, alcohol control, conservation, employment, urban and economic development, motor

For this reason as well, the Court should reject the FTC's proposed test.

C. Requiring Formal Review and Approval Would Increase Rather Than Decrease The Number Of State-Sponsored Restraints On Competition.

In rejecting the "compulsion" test proposed by the Government in *Southern Motor*, this Court emphasized that such a restriction would not only reduce the range of regulatory alternatives available to the States; but also, "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, . . . [it] may result in *greater* restraints on trade." 471 U.S. at 61.

The FTC's proposed new test would likely have similar effects. By limiting immunity to State proceedings with formal "determinations" (Pet. Br. 16), it is likely to stimulate the growth of State agency "orders" which evidence the requisite "affirmative review and approval." Agency "orders" are typically binding on the State and the regulated parties and naturally tend to restrict variations in conduct, displacing permissive regulatory programs in much the same way as would the compulsion requirement rejected in *Southern Motor*. In the example of the Pennsylvania Public Utility Commission's encouragement of electric energy conservation, see discussion, *supra*, at 14, the State would have been forced to command certain conduct, rather than encourage and actively supervise it.

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vehicles, and waste management matters. The proceedings conducted by these other agencies would, however, likely be several times more than those conducted by the utility commissions alone. Thus, the potential for regulatory "gridlock" is likely to be even greater.

Because of its likely impact in increasing the number of State-sponsored restraints on competition, the Court should reject the FTC's proposed standard.

II. FORMAL REVIEW AND APPROVAL BY THE STATE IS NOT REQUIRED IN ORDER TO ASSURE THAT THE CHALLENGED ACTIONS "ACTUALLY FURTHER STATE REGULATORY POLICY."

The FTC argues that this Court's decisions in *Midcal*, 324 *Liquor*, and *Patrick* "have recognized that the state action exemption does not apply to private conduct unless state officials determine that the particular conduct furthers, or is at least consistent with, the State's policies." Pet. Br. 17. Petitioner claims that unless "the state agency has acted affirmatively to review and approve" the challenged private conduct (Pet. Br. 5; Pet. App. 55a), there can be "*no assurance*" and "*no basis*" for concluding that respondents' anticompetitive price fixing was consistent with state policy." Pet. Br. 14 (emphasis supplied).<sup>7</sup>

Contrary to the FTC's contention (Pet. Br. 17), this Court's decisions in *Midcal*, 324 *Liquor*, and *Patrick* do not support this proposition. In each of these cases, ***the State was without the power to review the challenged private conduct*** so there was no need to examine the State's exercise of any supervisory power.

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<sup>7</sup> This is the standard applied by the FTC below, which the Third Circuit reviewed. In its brief on the merits in this Court, the FTC employs a similar formulation, arguing that "absent a determination by state officials" that the challenged action is "consistent with the State's policy," there can be no state action immunity. Pet. Br. 16.

In *Midcal*, for example, State law required wine wholesalers to "[p]ost a schedule of selling prices of wine to retailers or consumers. . . ." 445 U.S. at 99 n.1 (quoting Cal. Bus. & Prof. Code Ann. § 24866 (West 1964)). State law further directed that no State-licensed merchant may sell wine to a retailer other than at the posted price. *Id.* at 100. The key factor in *Midcal*, however, was that under the governing law: **"The State has no direct control over wine prices."** *Id.* (emphasis supplied).

Similarly, in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), State law required wholesalers to post monthly wholesale bottle prices with the State Liquor Authority and prohibited retailers from selling bottles at less than 112% of the posted price. As in *Midcal*, however, the State Liquor Authority did not have the power or responsibility to review these prices. Indeed, as the Government argued in that case, quoting from the New York State Court decision below, "[l]iquor prices are set by the wholesalers and **the State has no power to change the prices or review their reasonableness.**" Brief for the United States as *Amicus Curiae* at 11, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (No. 84-2022) (emphasis supplied).

In the present case, however, the Government's brief argues that in *324 Liquor*, "the Court held that state monitoring that does not exert 'significant control' over the terms of a private restraint does not qualify as active supervision." Pet. Br. 18. Petitioner's Brief cites for this proposition a footnote in *324 Liquor* (479 U.S. at 345 n.7). In fact, that footnote merely rejected the claim that the Liquor Authority's power to waive the requirement for an individual retailer for "good cause shown" and the State Legislature's

periodic consideration of proposed changes to this law "exert[ed] any significant control over retail liquor prices." *Id.* This certainly does not translate into a holding that active supervision requires the exercise of "significant control." Moreover, in *324 Liquor*, the Court was not required to reach the question of the exercise of State supervision because **the statutory scheme provided no authority or responsibility for State review of the posted prices.**

Most recently, in *Patrick v. Burget*, 486 U.S. 94 (1988), this Court rejected a claim of state action immunity because the State had no authority to review hospital peer review decisions. As the Court held: "The [State] Health Division's statutory authority over peer review relates only to a hospital's procedures; **that authority does not encompass the actual decisions made by hospital peer-review committees.**" *Id.* at 102 (emphasis supplied) (footnote omitted). Indeed, the Court emphasized that the respondents had not demonstrated that either the State Health Division or the State judiciary "even could review" the challenged peer review decision. *Id.* at 101.

In the present case, in contrast to *Midcal*, *324 Liquor*, and *Patrick*, it is clear, and apparently not disputed, that each of the States does in fact have the ultimate authority and responsibility to control the challenged fees. Pet. App. 30a (Arizona), 32a (Connecticut), 34a (Montana), 36a (Wisconsin). As a result, as the lower courts have noted, "*Patrick*, *Midcal*, and [*324 Liquor v.*] *Duffy* provide little guidance as to 'exercise' since none of them had to reach that question." *New England Motor Rate Bureau*, 908 F.2d at 1071.



Indeed, if the opportunity for State review were legally insufficient as a basis for finding active supervision, then this Court's analysis in *Patrick* of whether such review was available would have been totally unnecessary. In *Patrick*, there had been no judicial review of the challenged hospital peer review decision. Yet the Court devoted several pages of its opinion to an evaluation of whether such review were **available** under State law. 486 U.S. at 103-05. If the opportunity for review were legally insufficient to qualify for immunity absent its overt exercise, then there would have been no point in the Court's determining whether that opportunity existed. Thus, *Patrick* suggests, at least implicitly, that "**authority**" plus some "**opportunity for review**" by the State is sufficient for state action immunity.

There are, of course, strong federalism grounds supporting this conclusion. If federal courts must conduct trials of State regulators to determine whether the State sufficiently exercised its power to supervise the private conduct, then the result in *Parker* itself would have been different. Instead of reversing the district court's injunction, the Court would have remanded for trial to determine whether the California Agricultural Prorate Advisory Commission looked hard enough at, or merely "rubber stamped," the raisin prices collectively proposed by the growers. Compare *Parker*, 317 U.S. at 346-47, with Pet. Br. 16. One may imagine FTC lawyers cross examining W.B. Parker, Director of Agriculture, the members of the Agricultural Prorate Advisory Commission, and the members of the Program Committee for Raisin Proration Zone No. 1, to determine whether they engaged in a "meaningful examination" (Pet. App. 59a)

of the raisin prices proposed "[u]pon the petition of ten producers." *Parker*, 317 U.S. at 346.

In the present case, by second-guessing the States' **exercise** of their authorities, the FTC intruded more deeply upon the federalism basis for the doctrine than in any previous case. Rather than look at the authority of the State, it would undertake a trial to determine what the State has actually done in every regulatory matter. The standard, moreover, is essentially boundless, open to ever-changing interpretations by subsequent FTC staff and Commissioners, and federal district courts.

Moreover, as the commentators have explained, there is no basis for differentiating in this manner between federal and state agencies. "Charges of 'rubber stamping' industry proposals are as common in the federal field as in the state. There seems little reason to hold state agencies to a higher standard, particularly when Congress has been silent on the matter." I P. Areeda & D. Turner, *Antitrust Law* ¶ 213, at 75 (1978).

The weakness of the Government's argument based on this Court's prior decisions is further evidenced by its reliance on *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). The FTC cites *Cantor* as holding that an "affirmative determination by state officials" is required. Pet. Br. 20. However, as a result of this Court's decision in *Southern Motor*, the authority of *Cantor* as precedent is now open to serious question. In *Southern Motor* the Court repudiated at least three of the grounds for the holding in *Cantor*, and in effect limited *Cantor* to its unusual facts.

**First**, *Southern Motor* categorically rejected the idea expressed in *Cantor* that *Parker* does not shield

private parties. Compare *Southern Motor*, 471 U.S. at 56, with *Cantor*, 428 U.S. at 591-92 (actions by private party "not controlled by the *Parker* decision"). **Second**, *Southern Motor* also held that immunity does not depend on a finding—which *Cantor* found essential—that antitrust exemption is "necessary" to make the State regulatory program work. Compare *Southern Motor*, 471 U.S. at 57 n.21 (criticizing this idea as based on "a questionable dictum in *Cantor*"), with *Cantor*, 428 U.S. at 597-98 & n.37. **Third**, *Southern Motor* found that immunity does not require that the statute directly refer to the particular activity in question, so long as the State intended to displace competition. Compare *Southern Motor*, 471 U.S. at 64 ("A private party . . . need not 'point to a specific, detailed legislative authorization' for its challenged conduct"), with *Cantor*, 428 U.S. at 584 (criticizing state law because it "contains no direct reference to light bulbs").

As a result, *Cantor* cannot support the "affirmative review and approval" proposition for which the Government cites it.

Based on the consistent reasoning of these recent decisions, the Court should reject the proposed requirement for formal review and approval.

### III. CHANGING THE LAW TO REQUIRE SUCH FORMAL APPROVAL WOULD CREATE UNJUSTIFIED UNCERTAINTIES AND UNFAIRLY EXPOSE STATE PROGRAMS TO ANTITRUST ATTACK FOR PRIOR CONDUCT WHICH SATISFIED THE MIDCAL TEST.

Over the past eleven years since this Court's decision in *Midcal* in 1980, and particularly since this Court's decision in *Southern Motor* in 1985, hundreds of State agencies and thousands of regulated parties

have directly or indirectly relied on the two-pronged *Midcal* test. If the test were now changed to require States "affirmatively to review and approve" challenged private conduct, expectations based on the prior rule would be dashed and State programs and regulated private parties which relied on the rule would be exposed unfairly to federal antitrust attack.

We submit that the Court should reject this result for two reasons. **First**, the need for stability of the standard counsels against the change now advocated by the FTC. This is especially true here because Congress has had ample opportunity to review and revise the two-pronged *Midcal* test. Indeed, in amending the Sherman Act in 1984 to eliminate damage remedies for the acts of local governments, the House and Senate Committees repeatedly referred to and approved the *Parker* doctrine as enunciated by this Court. See, e.g., H.R. Rep. No. 965, 98th Cong., 2d Sess. 5 (1984); S. Rep. No. 593, 98th Cong., 2d Sess. 1 (1984). The House Report also expressly acknowledged and approved the *Midcal* decision. See, H.R. Rep. No. 965, 98th Cong., 2d Sess. 6 & n.5, 22 (1984). Congressional acquiescence, coupled with this Court's traditional respect for a settled rule of law, strongly counsel against the proposed change in the state action doctrine.

In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the Court reaffirmed the filed rate doctrine of antitrust immunity. In so ruling, the Court rejected the suggestion that it overturn that doctrine, finding that intervening developments were "insufficient to overcome the strong presumption of continued validity that adheres in the judicial inter-

pretation of [the Sherman Act]." *Id.* at 424. Relying on the reasoning of Justice Brandeis, who first enunciated the doctrine, Justice Stevens concluded that:

"Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation."

*Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

In the instant case, any correction of the long-established state action doctrine "can be had by legislation." Indeed, in 1984, with respect to local governments, the Sherman Act was amended by legislation to ease, rather than increase, the burden on States, and without any change in the state action doctrine. As this Court has long held, Congressional reenactment of a statute "generally includes the settled judicial interpretation." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988). For this reason as well, the Court should reject the FTC's argument for changing the law of state action immunity.

**Second**, the Court must consider the reliance of hundreds of State officials and State agencies, as well as thousands of regulated private parties, whose conduct satisfied the two-pronged *Midcal* test, but may fail the FTC's proposed new "affirmative review and approval" standard. These innocent parties would be exposed to retroactive antitrust attack, unless the Court applies the new law prospectively only. As the Court stated last Term:

In determining whether a decision should be applied retroactively, this Court has consistently given great weight to the reliance interests of all parties affected by changes in the law. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) ("Significant hardships would be imposed on cities, bondholders, and other[s] connected with municipal utilities if our decision today were given full retroactive effect"). To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions.

*American Trucking Ass'n, v. Smith*, 110 S. Ct. 2323, 2334-35 (1990). The "reliance interests of the parties" affected by such change in the law of state action immunity—including the States, State and local regulatory agencies, and regulated private parties—all counsel against retroactive application of such a new rule.

## CONCLUSION

The FTC's proposed restrictive rule would turn the state action doctrine on its head, destroying the federalism basis for *Parker*, causing regulatory "gridlock," and contributing to an increase in State-sponsored restraints. Moreover, it would unnecessarily disrupt settled doctrine in which Congress has acquiesced and expose existing State regulatory programs and regulated private parties to retroactive antitrust challenge.



For all of these reasons, *amicus curiae* respectfully urges the Court to reject the FTC's proposed "affirmative review and approval" standard for state action immunity.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION,  
v. *Petitioner,*

TICOR TITLE INSURANCE Co., *et al.,*  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

BRIEF OF AMERICAN INSURANCE ASSOCIATION,  
ALLIANCE OF AMERICAN INSURERS,  
HEALTH INSURANCE ASSOCIATION OF AMERICA,  
NATIONAL ASSOCIATION OF INDEPENDENT  
INSURERS, AND THE SURETY ASSOCIATION  
OF AMERICA AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

Does a state statutory scheme requiring administrative agency review of rate filings and rejection of all rates found to be unreasonable satisfy the "active supervision" standard for applying the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) ?

Do the principles of federalism underlying the *Parker* doctrine permit federal antitrust enforcement agencies to inquire whether state officials adequately carried out their state law responsibilities under such a scheme?

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BRIEF OF AMERICAN INSURANCE ASSOCIATION,  
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NATIONAL ASSOCIATION OF INDEPENDENT  
INSURERS, AND THE SURETY ASSOCIATION  
OF AMERICA AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS

---

INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are insurance trade associations and an insurance rating organization whose members write property and casualty and health insurance throughout the United States. The American Insurance Association ("AIA") is a national trade organization representing 252 companies writing property and casualty insurance.

AIA companies together write more than \$57 billion in premiums annually, representing 27 percent of all property and casualty insurance underwritten in the United States.

The Alliance of American Insurers ("Alliance") is a trade association of over 165 insurance companies writing property and casualty insurance throughout the United States. In 1990, member companies of the Alliance had a premium volume of nearly \$22 billion, accounting for approximately 10 percent of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is a national trade association representing the interests of over 560 property and casualty insurance companies. In 1990, NAII member companies were responsible for over \$54.6 billion in direct premiums written, amounting to approximately one-quarter of the total property and casualty market in the United States.

The Health Insurance Association of America ("HIAA") is the nation's largest health insurance trade association. HIAA represents 300 members that collectively provide health care coverage to 95 million Americans.

The Surety Association of America ("SAA") consists of 650 insurers that underwrite fidelity and surety bonds throughout the United States. SAA is licensed and regulated as either a rating or advisory organization by all the states, the District of Columbia and Puerto Rico.

The states pervasively regulate the ratemaking practices of the *amici's* member companies. In particular, to promote the availability of affordable insurance while preserving insurer solvency, most state legislatures have adopted a policy that rates shall be neither excessive nor inadequate. As an important means of implementing this policy, many states authorize insurers, through participa-

tion in state-licensed rating organizations, collectively to develop proposed rates for submission to state regulators.<sup>1</sup>

Reversal of the decision below could expose these companies to antitrust sanctions for conduct authorized and supervised by the states. In addition, the "active supervision" standard urged by the Federal Trade Commission would result in preemption or impairment of the rating laws which, for decades, have been in effect in a majority of the states. Since there are several varieties of state laws regulating industry cooperation on rates, many not addressed in the FTC proceeding below, *amici* desire to present their broader perspective on the types of state insurance regulation which should meet the "active supervision" standard.<sup>2</sup>

### SUMMARY OF ARGUMENT

1. The central issue in this case is the deference which the Federal Trade Commission must pay to state laws and state administrative practices when applying the federal antitrust laws in the face of a conflicting scheme of state regulation.

The Commission invoked the federal antitrust laws against the respondent title insurers: (a) notwithstanding

<sup>1</sup> In contrast to property and casualty insurers, health insurers do not collectively develop rates and most states do not authorize such activity. However, a small but increasing number of states require health insurers to provide coverage for small employers, otherwise unable to obtain coverage, and to spread the risk of such coverage through statutorily-established reinsurance pools. Since the members of these pools must agree on the premiums charged for this reinsurance, the availability of *Parker v. Brown* immunity is an important protection against antitrust liability for state-authorized conduct. HIAA members face similar regulatory requirements potentially implicating the antitrust laws. These state laws are the reason for HIAA's *amicus* participation.

<sup>2</sup> Petitioner and respondents have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

that their collective ratemaking was authorized by state law, as the FTC concedes (Pet. Br. at 8-9 n.7; and (b) despite state laws requiring state regulators to review the collectively-proposed rates. The Commission disregarded the existence of these laws requiring administrative supervision of rates. Instead, the FTC made its own assessment of whether state officials had, in the Commission's opinion, meaningfully reviewed rate filings. This standard for applying the *Parker* doctrine is fundamentally antithetical to our federalist system because it would permit a federal agency to assume functions properly those of state legislatures, state courts, and state administrative agencies.

2. The standard urged by the Commission would intrude on the policymaking sovereignty of state legislatures by dictating to them the types of laws they can enact for administrative supervision of rates. In this case, each of the relevant states, like a majority of the jurisdictions that authorize collective ratemaking by insurers, have adopted laws requiring: (a) that insurers file all collectively proposed rates with the state's insurance department; (b) that such rates "not be excessive, inadequate or unfairly discriminatory"; (c) that the department promptly review such filings to determine their consistency with these criteria; and (d) that the department "shall disapprove" those rates not satisfying the statutory standards. Under these regulatory regimes, state insurance officials statutorily "have" and are legally obligated to "exercise" the authority to substantively "review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

The FTC nonetheless regarded these laws as insufficient for purposes of the *Parker* doctrine. It did so on the grounds that they did not require formal administrative review of every rate filing, only formal action when necessary to disapprove rates found to be unreasonable. From

this, the FTC implied the absence of a requirement for substantive review of all proposed rates.

In fact, however, these laws, on their face, *require* regulators to make a judgment about the reasonableness of all proposed rates, whether or not the filing ultimately is the subject of a formal order disapproving it as unreasonable. The distinction made by the FTC—between filings which are the subject of a formal proceeding and those which are less formally reviewed—relates only to the procedural issue of *how* the required judgment of reasonableness must be made or manifested. The Commission's distinction is simply not germane to the substantive issue posed by the "active supervision" standard: *whether* a judgment on reasonableness must be made.

The FTC's test would have serious implications for state insurance regulation. In effect, the FTC seeks to impose administrative law standards quite different from those which a majority of the states have chosen to enact. If the FTC's position were adopted, many states would have to replace their present laws with ones requiring formal agency decisionmaking in the case of every rate filing if they wished to avoid collision with the federal antitrust laws. The FTC's position thus ignores this Court's prior admonition that the *Parker* doctrine not be construed in such a way as to "reduce[] the range of regulatory alternatives available to the State." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985).

3. The FTC's standard would also infringe on the sovereignty of the state judiciary. Based on its erroneous interpretation of the laws of the four relevant states, the FTC disregarded the existence of these statutes. It thus afforded state officials no presumption that they had carried out their statutory duties. Rather, the Commission conducted a *de novo* inquiry to determine whether state regulators had adequately reviewed rate filings.



In essence, the FTC became a tribunal for determining whether state regulators had carried out their statutory responsibilities for reviewing rates. This approach illegitimately federalizes state administrative law issues properly within the province of state courts.

4. In addition to intruding on the functions of state legislatures and the state judiciary, the FTC's standard would result in usurpation of the role of state administrators. In several respects, the Commission would become a federal regulator of state regulators.

First, the FTC would preclude state officials from exercising their discretion to determine the degree of attention that a particular rate filing should receive. The states' goal is to prevent rates that are unreasonably high or inadequate. A state can best pursue this goal by giving more scrutiny to filings proposing significant rate increases or reductions, rather than spreading its resources more thinly to give equal or significant attention to filings having little or no impact. The FTC's standard, however, would deter the states from exercising their discretion in this manner. Under the FTC's test, the failure to subject each filing to formal administrative review might expose insurers to federal antitrust liability, thus impairing the state's regulatory jurisdiction.

Second, the FTC's standard would prevent uniform, non-discriminatory application of a state's regulatory scheme. State insurance codes afford insurance departments exclusive jurisdiction to determine the reasonableness of rates and prohibit discrimination between similarly-situated insureds. The FTC's standard, however, would result in case-by-case preemption of the states' jurisdiction. Where a state's oversight was sufficiently active, in the FTC's opinion, it would retain its plenary jurisdiction. But where the Commission determined that the state's review of a particular filing was inadequate, the state's prior exercise of jurisdiction effectively would be nullified. Rates previously approved as reasonable could

be enjoined under the federal antitrust laws or treble damages awarded on the theory that such rates were unreasonable. Thus, in the same line of insurance, some rates previously approved by the insurance department would continue to apply to some policyholders while different rates would be charged to others for the same product, as determined by the federal antitrust enforcement agencies and federal courts.

Third, the FTC's standard would permit the Commission to substitute its judgment for that of the states on the appropriate methodologies for reviewing rates. In the proceeding below, the Commission did not regard state scrutiny of rate filings as "meaningful" where the Commission disagreed with the state concerning the information that should be supplied in support of rate filings, the components of rates that were the most significant, and the benchmarks for measuring rates that should be applied. The FTC's application of the "active supervision" standard thus creates the danger that the Commission would become a federal regulator of insurance rates and would do so through the application of standards in conflict with those selected by the states.

5. Application of the "active supervision" standard instead should be based on greater deference to state statutes. The principal concern expressed in cases such as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*"); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); and *Patrick v. Burget* is that the states not give private parties blanket permission to violate the antitrust laws without subjecting their conduct to meaningful regulatory oversight. This concern is met where a state adopts, by statute or regulation, a regularized procedure for administrative agency review of rate filings.

The existence of such a statute or regulation thus should create a strong presumption of "active supervision." A presumption based on state law is consistent with proper respect for state sovereignty and the courts'

unwillingness to assume that government officials will not carry out their statutory responsibilities.

6. There remains the remote possibility that state administrative agencies may utterly fail to carry out their regulatory obligations. Consequently, although a statute or regulation should create a strong presumption of "active supervision," that presumption could be rebuttable by a showing that the state's scheme, in practice, was a sham or mere pretense.

A "sham" exception should apply, however, only where state regulatory inaction is so persistent that it is tantamount to the legal absence of an administrative scheme of regulation, as in cases such as *Midcal*. The antitrust plaintiff, accordingly, would have to demonstrate that: (a) state regulators consistently defaulted on their responsibilities for reviewing rate filings; and (b) that there were no effective state law remedies to redress regulatory inaction. This test would strike the appropriate balance between the need for effective antitrust enforcement and the states' need for latitude in deciding how to implement their regulatory policies. It also properly assigns to the states, not to the FTC, the principal role in assuring that state officials fulfill their statutory duties.

## ARGUMENT

### I. THE FTC'S STANDARD WOULD UNDERMINE THE FEDERALISM PRINCIPLES OF THE PARKER DOCTRINE

The "rationale of *Parker* [*v. Brown*]" was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1351 (1991). The FTC has interpreted *Midcal*'s "active supervision" standard inconsistently with these federalist purposes.

The *Midcal* "active supervision" test requires that "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, 486 U.S. at 100-01. Where a state displaces pricing competition with a regulatory regime authorizing collective ratemaking, *Midcal* essentially requires the state to determine whether the jointly proposed rates are reasonable or otherwise in compliance with substantive state regulatory standards. See also *324 Liquor Corp. v. Duffy*, 479 U.S. at 343-45.<sup>3</sup>

The approach taken by the FTC in the proceeding below, however, would impose obligations on the states going well beyond a substantive judgment on rate reasonableness or consistency with state policy. Although the FTC now implies that it was merely inquiring whether the states had made a judgment on rate reasonableness, *Pet. Br.* at 21-22, the record establishes that the Commission looked to considerably more than that.

The FTC actually required not only that the state make such an assessment, but that the state manifest it through some type of "affirmative determination." In particular, the FTC would compel state regulators to review each rate filing in a formal administrative hearing or similar

<sup>3</sup> Apart from the state action doctrine, the McCarran-Ferguson Act provides a limited exemption from the antitrust laws for conduct within the "business of insurance," if it is "regulated by State law" and does not entail "boycott, coercion, or intimidation." 15 U.S.C. §§ 1012(b), 1013(b). Because of its limited nature, however, the McCarran-Ferguson exemption may be unavailable for collective ratemaking by insurers, in which instance the state action doctrine is an alternative form of antitrust immunity. As in this case, the courts frequently consider both the Act and the state action doctrine in insurance antitrust cases. See, e.g., *In Re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991); *Haas v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1812 (1990); *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020 (8th Cir. 1987).

proceeding culminating in a written order. If they did not, the FTC would afford *Parker* immunity to regulated insurers only where state officials could testify that they had undertaken a review which was "meaningful" in the Commission's estimation. See, e.g., Pet. App. 59a, 62a.

The FTC's standard would unduly intrude on state regulatory sovereignty in three ways. *First*, as discussed in part A below, the FTC would limit the states' freedom to select the desired type of statutory scheme for substantive review of proposed rates.

*Second*, as discussed in part B below, the Commission's approach would not afford state officials any presumption that they had conducted a statutorily-required review of rate filings. In effect, therefore, the FTC's standard contemplates federal review of administrative agency compliance with state law—an appellate-type scrutiny of state agency action that trespasses on the function of state courts.

*Third*, as also discussed in part B, the Commission's test would necessitate a collateral federal proceeding to inquire into the ratemaking methodologies used by state officials and the depth or effectiveness of their review. See Pet. Br. at 22-24. In effect, the FTC would be transformed from an antitrust enforcement agency into a federal rate regulator.

#### **A. The FTC's Standard Should Be Rejected Because It Would Significantly Curtail State Legislative Sovereignty**

Collective ratemaking plays an important, indeed, central role in state regulation of insurance rates. This is due to the unique difficulty of pricing the insurance product. Future losses are the major element in the cost of insurance but are inherently difficult to predict.<sup>4</sup>

<sup>4</sup> This problem is repeatedly acknowledged in the legislative history of the McCarran-Ferguson Act: "The theory of insurance is

To facilitate accurate projection of prospective loss costs, most states have authorized: (1) industrywide pooling of data on historic loss experience; and (2) industry cooperation in actuarial projection of that data into the future. See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. at 221 (referring to "the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation"). Because rating organizations permit more accurate pricing, the states regard them as a critical means of implementing the policy that rates be both reasonable and adequate to maintain insurer solvency. The FTC's contrary characterization of collective ratemaking as "price-fixing," serving only private interests, is thus not consistent with the judgments that the states have made.

The states, however, do not merely sanction collective ratemaking without regulating the end results. In virtually all of the states that authorize collective ratemaking, proposed rates *must* be filed with insurance departments. They can be approved *only* if they are found to be "just and reasonable," not "excessive, inadequate or unfairly discriminatory," or meet other substantive statutory criteria measuring reasonableness. State ratemaking laws differ, however, on how insurance departments must make and manifest these mandatory determinations of reasonableness.

A few states require affirmative "prior approval" of all filings: before the rates can go into effect, the insurance department formally must signify, by holding a hearing or issuing an order, that they have been found reasonable.<sup>5</sup> In the great majority of states, however, the in-

the distinction of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943), quoted in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

<sup>5</sup> Four states use this "strict" prior approval system for automobile insurance. Three states and the District of Columbia use



surance department is required to take formal action only when it determines that a proposed rate is *unreasonable*; rates found to be reasonable can go into effect after review but without a formal order.

Over the years, the states increasingly have favored this approach as a more efficient means of implementing state regulatory policy than requiring formal administrative review of every rate filing, regardless of its significance. Any modification of a previously filed rate or rating plan, no matter how inconsequential, must be the subject of a filing. In addition, filings may effect little or no change in rate levels or seek only routine annual inflation adjustments. A detailed, in-depth review of these rates is seldom necessary to determine whether they are consistent with state policy. Consequently, statutes requiring formal action only in the case of potentially unreasonable rates free the states from a wasteful commitment of resources and permit them to focus on filings posing significant questions of consistency with state policy.

Statutes of this latter variety fall into three general categories:

- Prior approval laws with “deemed approved” clauses require substantive review of rates during a prescribed period after filing. Rates are permitted to go into effect if formally approved or, if not, they are “deemed” approved if not formally disapproved by the end of the waiting period.<sup>6</sup>

prior approval for commercial property-casualty insurance. Nine states use prior approval for workers’ compensation insurance and two states and the District of Columbia use it for homeowner’s insurance. See Appendix to Brief of *Amici Curiae* (“Appendix”).

<sup>6</sup> This “prior approval” with a “deemer clause” system is the most prevalent. Thirty-four states, the District of Columbia, and Puerto Rico use this system for automobile insurance. Thirty-two states and Puerto Rico use it for commercial property-casualty insurance; twenty-eight states for workers’ compensation insurance

- “File-and-use” statutes permit rates to become effective upon filing but require them to be reviewed for reasonableness after filing. Rates found to be unreasonable must be rescinded or lowered.<sup>7</sup>
- “Use-and-file” statutes require that rates be filed shortly after their effective date and then be reviewed. Rates determined to be unreasonable must be withdrawn or reduced.<sup>8</sup>

Under the Commission’s analysis, however, statutes of these types would not, standing alone, satisfy the *Midcal* “active supervision” test; they would not create a presumption of state oversight; and they would not even have to be considered in the *Parker* analysis. See Pet. Br. at 19-20. The Commission’s position is based on an interpretation of these laws as merely making rate review discretionary rather than mandatory, and as requiring merely procedural, not substantive, review.

The FTC’s reading of the statutes is premised on the fact that regulators are not required to conduct hearings

(plus eight additional states for the workers’ compensation assigned risk pool); and thirty states and Puerto Rico for homeowner’s insurance. See Appendix.

<sup>7</sup> Sixteen states and the Virgin Islands use this system for automobile insurance, while fifteen states and the Virgin Islands use it for commercial property-casualty insurance. Four states use this system for workers’ compensation insurance and fifteen states and the Virgin Islands use it for homeowner’s insurance. See Appendix.

<sup>8</sup> Twelve states use this system for automobile insurance; twelve for commercial property-casualty insurance; four for workers’ compensation insurance; and ten for homeowner’s insurance. See Appendix.

Some states have variants on these basic approaches. For example, “flex” rating laws permit automatic annual inflation adjustments without prior approval but require prior approval for proposed increases in excess of the statutorily-prescribed inflation factor. “Flex” rating statutes are thus premised on legislative determinations that annual, inflation-related increases are reasonable *per se*.

or issue orders in the case of reasonable rates, but are directed to do so only in the case of rates found to be unreasonable. In the case of rates found to be reasonable, the FTC considers the failure to take formal administrative action as indicating that the rates were never evaluated. The FTC thus concludes that rates filed under the statutory systems described above can, in some cases, go into effect through the "inaction or passive acquiescence" of state officials. See Pet. Br. at 20.

That interpretation of these state laws is erroneous. The FTC mistakenly interprets procedural provisions dispensing with the need for formal hearings and orders as substantive provisions also dispensing with the need for a judgment on reasonableness. The plain language of these statutes, however, requires a determination of reasonableness. The wording of these laws is mandatory, not permissive. Insurers must file for approval of every proposed rate.<sup>9</sup> Rates "shall not" be excessive, inadequate, or unfairly discriminatory.<sup>10</sup> The insurance department

<sup>9</sup> Insurers must also seek approval of every rating plan or schedule describing the ratemaking methodologies or risk classification systems used in setting rates. See, e.g., Iowa Code Ann. § 515F.5 ("Every insurer shall file with the commissioner . . . every manual, minimum premium, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use"); 24-A Me. Rev. Stat. Ann. § 2304-A (same). Insurers additionally are required to support their requests with statutorily-specified information, including statistical data on loss experience and the insurer's interpretation of that information. *Id.*

<sup>10</sup> See, e.g., Wis. Stat. Ann. § 625.11(1) ("Rates shall not be excessive, inadequate or unfairly discriminatory") (emphasis added); Ariz. Rev. Stat. Ann. § 20-356(1) ("Rates shall not be excessive, inadequate or unfairly discriminatory") (emphasis added); Conn. Gen. Stat. Ann. § 38a-686(a) ("Rates shall not be excessive, inadequate or unfairly discriminatory") (personal risk insurance) (emphasis added); *id.* § 38a-665(a) ("Rates shall not be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory") (commercial risk insurance) (emphasis

"shall review filings as soon as reasonably possible after they have been made in order to determine whether [the filings] meet" this requirement.<sup>11</sup> After review, the insurance commissioner "shall" disapprove rates that are excessive.<sup>12</sup> State insurance codes additionally make clear that the insurance commissioner is obliged by law to fulfill those responsibilities.<sup>13</sup>

In sum, the FTC is simply wrong in suggesting (Pet. Br. at 30) that rates filed under the "disapproval" type of statute undergo only a ministerial review for compliance with filing requirements. Approval under the "disapproval" category of laws, no less so than under laws requiring formal approval in all cases, requires a substantive regulatory judgment about the reasonableness of the proposed rate.<sup>14</sup> That review, moreover, is

added); Mont. Code Ann. §§ 33-16-101(1), 33-16-201(1)(a) ("Rates shall not be excessive or inadequate, as defined herein, nor shall they be unfairly discriminatory") (emphasis added).

<sup>11</sup> See Del. Code Ann. § 2506(a); see also Haw. Rev. Stat. Ann. § 431:14-104(i) (same); Iowa Code Ann. §§ 515A.4(3), 515F.5(2) (same); Kans. Stat. Ann. § 500.2408(1) (same); N.D. Cent. Code § 26.1-25-04(3) (same); R.I. Gen. Laws Ann. §§ 27-6-10, 27-9-9; S.C. Code Ann. § 38-73-960 (same); Utah Code Ann. § 31A-19-406(1) (same).

<sup>12</sup> See, e.g., Iowa Code Ann. § 515F.6; Kans. Stat. Ann. § 40-929. Typically, the insurer or rating organization whose filing was rejected may then request a hearing during which the insurer "bears the burden of proving compliance with the standards established by this Act." *Id.*

<sup>13</sup> See, e.g., Mont. Code Ann. § 33-1-311(1) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); Wis. Stat. Ann. § 601.41(1) ("The Commissioner shall administer and enforce" the state's insurance code, including rate review requirements).

<sup>14</sup> The FTC elsewhere has conceded that ratemaking laws of the type involved in this case require substantive determinations of rate reasonableness. In *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the Commission stipulated, as to ratemaking laws essentially the same as involved here, that "the

mandatory, not discretionary, as the FTC wrongly suggests. See Pet. Br. at 19.

Regulation of rates under the "disapproval" variety of state statute therefore entails no abdication of rate regulation to private parties. State insurance departments have the power and obligation to prevent unreasonable rates from being charged to policyholders.

The FTC thus elevates form over substance in distinguishing between statutes based on the procedural manner in which state insurance departments must evidence the outcome of their scrutiny. Neither *Midcal* nor *Patrick* dictates the procedural mechanism by which a state administrative agency must undertake its review. *Patrick* in fact suggests that such procedural issues are irrelevant for state action purposes. This Court's only requirement has been that the states "have" and "exercise" the "ultimate authority" to determine whether private conduct is consistent with state regulatory policy. Statutes requiring disapproval of all excessive rates amply confer such authority on state regulators and obligate them to exercise it.

The FTC's contrary reading of these laws would have serious consequences for state regulation if the decision below is reversed. The Commission's approach would limit significantly the discretion of state legislatures to enact the type of rate review statute they conclude would best serve the state's chosen regulatory policy.

In effect, the Commission has substituted its judgment for that of the states on the types of administrative review that are effective. Indeed, the FTC's judgment—apparently in favor of a strict "prior approval" law—dif-

failure to suspend or reject a rate indicates a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute. . . ." 908 F.2d at 1077; see also Pet. App. 113a (separate statement of Commissioner Azcuenaga).

fers from the judgment of a substantial majority of the states. Most have rejected formal administrative review of all rate filings. They have done so for two substantial reasons: (1) to minimize the impact of regulatory lag on the financial condition of insurers needing rate increases;<sup>15</sup> and (2) to avert wasteful expenditure of administrative resources on insignificant filings better spent on filings raising serious questions of consistency with statutory standards.

The Commission's approach, however, would reimpose on the states a type of administrative review which most of them, through considerable experience, have found to be insufficiently flexible. The FTC's rigid formalism would also impose a straightjacket on the states preventing them from "serv[ing] as a laboratory" and "try[ing] novel, social and economic experiments without risks to the rest of the country"—the cornerstone of federalism. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

#### **B. The FTC's Standard Should Be Rejected Because It Would Lead to Federal Oversight of State Rate Regulation**

The FTC's standard would have an equally pernicious effect on state administrative implementation of rating laws. In those states enacting the "disapproval" variety of law—and possibly even in those jurisdictions having a "prior approval" statute—the FTC would afford state officials no presumption that they had complied with their statutory duty to review rates for reasonableness. Al-

<sup>15</sup> A statutory scheme that permits rates to go into effect without prior approval reconciles two conflicting goals of regulators: the need to scrutinize applications, but also to avoid undue delays in the availability of justified rate increases. "If requested rate increases are justified, such lengthy delays result in inadequate rates for the period of the delay." Comptroller General, *Issues And Needed Improvements In State Regulation Of The Insurance Business* 68 (1979) (No. B-192813) (hereinafter "GAO Report").



though the Administrative Law Judge who initially considered the FTC's complaint applied such a presumption,<sup>16</sup> the Commission declined to adopt it.

Indeed, the FTC's test would appear to create a presumption of administrative irregularity. The burden would be on the antitrust defendant, as the proponent of the *Parker* defense, to show that state officials had fulfilled their regulatory responsibilities. In the absence of proof that state officials had made an "affirmative determination" with regard to each of the rate filings being challenged, the FTC conclusively would presume the absence of active supervision—without considering other aspects of the state's regulatory system or the overall history of supervision. For several reasons, this refusal to apply the presumption of administrative regularity is inconsistent with the federal respect for state regulatory sovereignty that underlies the *Parker* doctrine.

First, the FTC's "affirmative determination" test would impair state implementation of policies favoring collective ratemaking. The test offers no clear-cut standard by which insurers could determine, in advance, whether collective ratemaking would expose them to antitrust liability. Immunity would depend, not on the present existence of readily ascertainable state laws meeting the *Midcal* standards, but on the FTC's *ex post facto* assessment of the future actions of state regulators in response to the particular rate filing being challenged. Since the level of activity by state officials in response to a particular filing, let alone the outcome of the FTC's assessment, cannot be predicted in advance, insurers could never be sure whether state action immunity would apply to a particular filing. Many would be unwilling to run the resulting risk of antitrust liability, thus frustrating

<sup>16</sup> See Pet. App. 239a ("This allocation of proof is grounded on the assumption of official regularity and the concomitant notion that respondents should have no burden of proving that state officials do what they are supposed to do under their own statutes").

state policy in favor of industry cooperation. While the FTC may disagree with this policy as inconsistent with the FTC's procompetitive goals, the very purpose of the *Parker* doctrine is to reserve to the states the policy choice between competition and regulation.

The FTC's standard also would result in disruption of the uniformity of state administrative schemes of regulation. Where the FTC found state scrutiny of a filing to be insufficient, the states' regulatory jurisdiction would effectively be nullified. The federal antitrust laws could be invoked to lower rates below the levels previously determined by state regulators to be reasonable, through the award of damages or injunctive relief. This filing-by-filing preemption of state jurisdiction would lead to a fractured system of rate regulation, making it difficult for state regulators to implement, in a consistent manner, state policies mandating that rates be neither excessive nor inadequate and prohibiting discrimination. Such piecemeal exercise of federal jurisdiction to disrupt the uniformity of complex state administrative processes has long been disfavored. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Second, the FTC's standard would impair state insurance regulation by fashioning a novel federal remedy for those alleging state administrative agency violations of state law. In the four states relevant to this proceeding, active supervision was mandated by state law. In nevertheless finding a lack of active supervision, the FTC essentially seeks to adjudicate claims that state regulators have not complied with their statutory duties.

This Court recently suggested that the *Burford* doctrine's federalism principles are most compelling where there is "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors. . . ." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491

U.S. 350, 362 (1989). Indeed, it "is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1983). That is essentially what the Commission is attempting to do in this case. The Commission seeks to instruct state officials that satisfactory implementation of their rating laws must include the sort of "affirmative determinations" sought by the Commission.

Third, the FTC's standard would allow a federal agency to make qualitative assessments of state regulatory effectiveness. All too easily, such federal evaluations of state regulation would permit the FTC to substitute its judgment for that of the states on the appropriate means of regulating rates.

Under the Commission's approach, state officials would have to be subpoenaed for deposition or trial testimony on the actions they took in reviewing a particular rate filing. The FTC (or a federal judge or jury) would then assess the professional performance of those state officials. Here, for example, the FTC chose to disregard the testimony of the former chief deputy director of Arizona's insurance department, who stated that every filing during his tenure (1973-1982) was "scrutinized" by his department. Pet. App. 121a; J.A. 46-47. The FTC also found insufficiently active supervision based on the brevity of state review of filings, without taking into account that state regulatory expertise allows more expeditious scrutiny of rate filings than in the case of those not versed in the field, such as the FTC's staff. A basic flaw in the FTC's standard, therefore, is that it presumes the Commission to have equal or greater expertise than state insurance departments in determining what constitutes effective review of a rate filing.

In addition to ascertaining whether state regulators gave sufficient attention to filings, the Commission evaluated the

substantive standards which they applied. For example, the FTC found a lack of active supervision in Connecticut and Wisconsin based, in part, on the failure of those states to regulate what the FTC regarded as an important element of rates (agents' commissions). See Pet. App. 57a, 59a, 62a. The FTC found a lack of active supervision in Arizona and Wisconsin because those states used historically prevailing rates as benchmarks for assessing rate filings. See Pet. App. 60a, 63a-64a, 68a.

Indeed, the Commission's evaluation of state regulation improperly imposed the policies of federal antitrust law upon the states. With respect to Connecticut, Wisconsin, and Idaho, the Commission held that state regulators did not adequately supervise because they allegedly gave minimal review to endorsements and amendments that did not "involve generalized rate increases." Pet. App. 60a (Connecticut). The rationale for this conclusion was that "even if the economic effects of these changes were not substantial, there is no *de minimis* exception to the antitrust laws." Pet. App. 63a (Wisconsin); see also Pet. App. 73a (Idaho).

It is true that, under the FTC and Sherman Acts, price-fixing is unlawful regardless of whether the prices jointly set by competitors are reasonable or unreasonable. That is not the policy of the states in the case of insurance, however. Their goal is reasonable rates, whether set collectively or individually.

Consequently, the state's only regulatory obligation is to determine whether proposed rates are consistent with that policy, not whether they involve concerted action within the meaning of the federal antitrust laws. See *Midcal*, 445 U.S. at 105. Contrary to the FTC's conclusion, therefore, it is fully consistent with state regulatory policy to afford *de minimis* review to rate filings that do not have a significant effect on consumers.<sup>17</sup>

<sup>17</sup> Not surprisingly, a study by the General Accounting Office found that "[t]he amount of time spent [by state insurance regu-

The FTC's engrafting of antitrust standards on state insurance regulation thus demonstrates the inherent danger of federal evaluations of state regulatory effectiveness. Such "ex post facto . . . assessment[s]" of state regulatory decisions carry with them the risk that the FTC's perception of the "public interest" will differ from that of the states. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1352 (1991). The very purpose of the *Parker* doctrine, however, is to reserve to the states such judgments about the appropriate form of economic regulation. The Commission's "active supervision" standard should thus be rejected because of its potential to "compromise the States' ability to regulate their domestic commerce." *Id.* See also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) (even federal constitutional guarantees should be applied so that "within broad limits . . . the States [are] free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public").

Finally, if the FTC's "affirmative determination" standard is adopted, the interests of neither state regulatory sovereignty nor the federal antitrust laws would be served. In *Southern Motor Carriers*, the Court held that the state action doctrine should apply not only where the state totally eliminates competition, such as by compelling collective ratemaking, but also where the state substantially displaces competition without completely eradicating it, such as by authorizing collective ratemaking but allowing individual company filings. The Court's reasoning was that conditioning *Parker* immunity on the total displacement of competition would unduly confine state regulatory discretion while also being inconsistent with the policies of the Sherman Act:

The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of

lators] on individual rate filings generally depended on the complexity and impact of those filings." *GAO Report, supra* note 15, at 62.

federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

*Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985).

The FTC's suggested standard here could have the same perverse effects that caused the Court to reject a compulsion standard in *Southern Motor Carriers*. If the states are forced to make an "affirmative determination" on every rate filing, regardless of the filing's significance, the states may be unable to commit the additional necessary resources. If so, the states may be compelled to eliminate the option, presently available to insurers in most jurisdictions, of seeking approval of individual company rates different from the collective rates filed by rating organizations. Ironically, therefore, the FTC's standard could lead to a diminution in competition, as well as an undue restriction on state autonomy.

### C. The FTC Is Not Entitled to Deference on Findings Relating to State Law and State Action

In arguing that the federal courts must defer to its "factual" findings concerning the "active supervision" standard, Pet. Br. at 27-31, the Commission erroneously equates the state law questions relevant to the *Parker* doctrine with the factual questions committed to the FTC's expertise.

The state officials examined below were not fact or expert witnesses testifying about the conduct of respondents or about economic issues pertinent to the antitrust



determinations as to which the FTC has responsibility. They were testifying, in their capacity as representatives of a sovereign, on state law and state actions that are not subject to the FTC's antitrust jurisdiction at all.

More specifically, state regulators testified about two categories of state regulatory issues. One was the meaning of state rating laws. This is clearly an area where deference should be paid to state officials, not to the Commission, and one that involves quintessentially legal questions which the appellate courts can review *de novo*.

Second, state officials testified as to the actions they took on rate filings. On these issues the FTC must accept the testimony of state regulators and cannot evaluate it based on "the credibility of witnesses." Pet. Br. at 28. To do so would be to apply *Parker* in a manner that this Court recently has rejected: "the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Omni*, 111 S. Ct. at 1352. The court below was thus fully justified in rejecting FTC findings based on federal assessments of the veracity of state regulators.

## II. THE EXISTENCE OF A STATUTORY MECHANISM FOR SUBSTANTIVE REVIEW OF RATE FILINGS SHOULD CREATE A STRONG PRESUMPTION OF "ACTIVE SUPERVISION"

In this case, the Commission concedes the existence of state laws authorizing collective ratemaking by title insurers. The Commission further acknowledges the existence of an administrative scheme for regulation of those rates; the Commission disputes only the efficacy of that scheme. In this situation, where the states incontestably have established administrative schemes of price regulation, the *Midcal* "active supervision test" should principally be based on whether the applicable statutes provide for the type of substantive review required by *Midcal* and *Patrick v. Burget*.

If state laws do so on their face, there should be a strong presumption of active supervision. Independent

proof of actual state regulatory action should be required, as part of the antitrust defendant's *prima facie* case, only in the absence of state laws evidencing that state regulators "have" and are obligated to "exercise" control over private conduct.

From an antitrust standpoint, the existence of a statutorily-mandated process for substantive review of state-authorized anticompetitive conduct indicates that the state is not merely giving blind permission for what is "essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. From a state regulatory standpoint, a statute-based presumption takes appropriate account of the policy of federal deference to state regulation upon which the *Parker* doctrine is founded. More broadly, a presumption of active supervision would be consistent with the "presumption against finding preemption of state law in areas traditionally regulated by the states." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Since insurance regulation has long been an area of state supremacy,<sup>18</sup> it is thus appropriate to shield state laws governing review of rate filings against federal antitrust preemption.

A presumption of active supervision is also supported by the conceptually similar presumption of regularity accorded to administrative decisionmaking.<sup>19</sup> In the ab-

<sup>18</sup> In the McCarran-Ferguson Act, Congress statutorily has announced a general national policy that federal statutes not specifically relating to the "business of insurance" should not be construed to "invalidate, impair, or supersede" state insurance laws and a more specific policy that the federal antitrust laws not apply to conduct "regulated by State law." 15 U.S.C. § 1012.

<sup>19</sup> The presumption of regularity has enjoyed a long history. See, e.g., *INS v. Miranda*, 459 U.S. 14, 18 (1982); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); *R. H. Stearns Co. v. United States*, 291 U.S. 54, 63 (1934); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Weyauwega v. Ayling*, 99 U.S. 112, 119 (1879). The presumption of regularity equally may be invoked in favor of state administrative officials. See, e.g., *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 535 (1938); 29 Am. Jur. 2d *Evidence* § 172, at 216 (1967).

sence of evidence to the contrary, there is a "very strong presumption" that public officers have "properly discharged the duties of their office and performed faithfully those matters with which they are charged."<sup>20</sup> 29 Am. Jur. 2d *Evidence* § 171, at 212-13 (1967). Courts also presume "that public officers have not culpably neglected or violated their official duties." *Id.* (footnotes omitted).

Finally, a standard that looks to the existence of a statutorily-mandated review process provides more clear-cut guidance to state regulators and regulated entities than does a *post hoc*, fact-based inquiry into the particular actions of particular state officials with regard to particular rate filings.

A presumption in favor of active supervision would, however, be rebuttable, not conclusive. This is to allow for the exceptional possibility "that the statutory provisions here under review were mere pretense." *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958). That is, although a state statute or regulation requiring review of rate filings would create a strong presumption of active supervision, that presumption could be overcome by evidence that the regulatory regime was a complete "sham" allowing private cartel-type arrangements to operate free from state oversight.

Precedent for this approach lies in the similar "sham" exception to the *Noerr-Pennington* doctrine which, as this Court recently has recognized, is complementary to the *Parker* doctrine. See *Omni*, 111 S. Ct. at 1353, 1355. The shared concept of the two doctrines is that restraints of trade effected through governmental action are not reachable by the antitrust laws, even if prompted by proposals from private parties.

Under *Noerr*, once it is established that the challenged conduct on its face constitutes petitioning of the govern-

<sup>20</sup> This presumption is based upon the regulatory expertise of the administrators, as well as "a general belief that most government officials act with integrity." C. Koch, *Administrative Law and Practice* § 1.28, at 48-49 (1985).

ment, there is a strong presumption of immunity. Under *Noerr*'s "sham" exception, the burden then shifts to the plaintiff to demonstrate that its injury was not occasioned by the government's decisionmaking, but rather by the defendant's invocation of the governmental process as a subterfuge for a private restraint of trade. See *Omni*, 111 S. Ct. at 1354-55.

A "sham" exception to *Parker* would operate in much the same way and have much the same purpose. Once the state statutorily has authorized the challenged restraint, and by statute or regulation subjected it to substantive review, immunity should be available except upon a showing by the antitrust plaintiff that the state's role was a "mere pretense."

Proof of a "sham" regulatory regime, however, should not consist of a mere showing that state regulators erroneously assessed the reasonableness of the rates proposed in the particular filing; did not make an "affirmative determination" of reasonableness; or did not conduct the statutorily-required review of the filing in question. *Parker* immunity is available irrespective of whether regulatory determinations by state officials were "substantively or even procedurally defective." *Omni*, 111 S. Ct. at 1349. In addition, many rate filings require only *de minimis* review because they have no significant impact on consumers. Failure to actively scrutinize those filings thus does not raise a danger that the rates will be inconsistent with state regulatory policy. Consequently, where, by statute or regulation, proposed rates must be reviewed by the administrator, the *Parker* doctrine should not then "allow plaintiffs to look behind the actions of state sovereigns to base their claims. . . ." *Id.* at 1353.

Rather, the presumption created by a statutory mechanism for rate review should be rebuttable only under a twofold test. First, it would have to be shown that regulators, in the case of filings relating to the applicable line of insurance, never conducted the statutorily-required reviews. Only persistent, widespread inaction, amounting



to the total absence of an administrative scheme of regulation as in cases such as *Midcal*, should justify overturning the presumption of active supervision. Thus, a showing that regulators have, in the past, rejected rate filings that were unreasonable, or demonstrated a "basic level of activity," should be enough to defeat any assertion that the state's chosen regulatory regime is a "sham." See, e.g., *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d at 1077 (finding of active supervision based on FTC stipulation that "unreasonable rates [are] rejected" by state regulators).

Second, the "sham" exception should be applied only where there are no effective state law remedies to cure inaction by state insurance departments. The federal courts traditionally have been reluctant to create federal remedies for unlawful state action where adequate state law remedies are available. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 542-44 (1981).

State law remedies are also relevant because review of rates after initial approval of filings can constitute active supervision. For example, most states permit policyholders to file complaints with state insurance commissioners alleging unreasonably high rates. The commissioner is then authorized to conduct investigations, with subpoena power.<sup>21</sup> This administrative remedy does not have the drawbacks that the government ascribes to mandamus

<sup>21</sup> See, e.g., Ariz. Rev. Stat. Ann. § 20-367; Conn. Gen. Stat. Ann. § 38a-678; Mont. Code Ann. §§ 33-16-204; 33-16-205; 33-16-206. Policyholders aggrieved by the insurance department's decision typically have the right of appeal to state court. See, e.g., Conn. Gen. Stat. Ann. §§ 4-183, 4-184; Mont. Code Ann. § 33-16-113.

In addition, insurance commissioners invariably are required to conduct periodic examinations of rating organizations to monitor their compliance with rating laws. See, e.g., Ariz. Rev. Stat. Ann. § 20-370; Conn. Gen. Stat. Ann. § 38a-677; Mont. Code Ann. § 33-16-106 (1991). Insurance commissioners also are empowered to review the rating organizations *sua sponte*. *Id.* The insurance commissioner may take appropriate steps to prohibit or otherwise correct any ratemaking practice inconsistent with the substantive criteria of the state's rating laws.

(Pet. Br. at 25-26): (1) administrative review is not an extraordinary remedy strongly disfavored; (2) no expenditure of consumer resources is required to prosecute the action, since the commissioner conducts the investigation; (3) relief is not piecemeal, benefitting only a few consumers, since the commissioner may apply any finding of rate unreasonableness generically to all policyholders; and (4) the administrative proceeding can afford retroactive relief in the form of rate adjustments.

Further, many states give notice of rate filings, especially by rating organizations, to consumer representatives, such as statutorily-designated "public advocates." Typically, such consumer representatives are authorized by statute to request rate hearings.<sup>22</sup> The fact that a public advocate has elected not to contest a filing is additional evidence of rate reasonableness. Finally, some states require or authorize annual or retrospective review of rates, that is, determinations by the insurance commissioner whether rates previously or currently in effect were or are excessive, with the power to order revisions, refunds or credits against future premiums.<sup>23</sup>

These post-approval mechanisms are relevant to the "active supervision" issue for two reasons. First, they evidence the states' continuing power to "monitor market conditions" and to undertake a "'pointed reexamination'" of regulatory programs. See *324 Liquor Corp. v. Duffy*, 479 U.S. at 345. Second, supplemental mechanisms for supervision of rates act as a corrective to state regulatory inaction on the original rate filing.

A "sham" exception thus would strike a proper balance between respect for state sovereignty and protection against state laws which throw "a gauzy cloak of state involvement" over unregulated restraints of trade. *Midcal*, 445 U.S. at 106. In this case, on their face, the laws of the relevant states require determinations of reason-

<sup>22</sup> See, e.g., 24-A Me. Rev. Stat. Ann. § 2374(2); N.J. Stat. Ann. § 52:27E-18.

<sup>23</sup> See, e.g., Iowa Stat. Ann. § 515F.6.



ableness and hence there should have been a strong presumption of active supervision. The Commission failed to overcome that presumption, because: (1) there was a "basic level of activity" demonstrating meaningful implementation of state rating laws; and (2) the Commission failed to demonstrate the absence of alternative supervisory mechanisms over rates which could have redressed any state inaction on initial rate filings.

### CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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## **APPENDIX**

## APPENDIX

## STATE RATING SYSTEMS \*

## I. AUTOMOBILE

## (1) Strict Prior Approval

Delaware  
Nevada  
New Hampshire  
Oklahoma (if rate change exceeds 15%)

## (2) Prior Approval with Express Deemer

Alabama  
Alaska  
Arkansas  
California  
Colorado (assigned risk)  
Connecticut (personal and residual market rates in  
a noncompetitive market)  
District of Columbia  
Georgia (private passenger)  
Hawaii  
Iowa (in a noncompetitive market)  
Kansas  
Kentucky (in a noncompetitive market, or if rate  
change exceeds 25% within 12 months, or if resid-  
ual market rate)  
Louisiana  
Maryland  
Michigan (excluding private passenger in a competi-  
tive market)  
Mississippi  
Missouri (commercial casualty if rate change ex-  
ceeds 25% annually)

---

\* This appendix is based upon a statutory review conducted by the American Insurance Association.



Nebraska  
 New Mexico  
 New York (in a noncompetitive market)  
 North Carolina (private passenger)  
 North Dakota  
 Ohio (commercial casualty in a noncompetitive market)  
 Oklahoma  
 Oregon (commercial liability specified by regulator)  
 Pennsylvania  
 Puerto Rico  
 Rhode Island  
 South Carolina  
 South Dakota (if closer supervision is necessary)  
 Tennessee (personal coverage)  
 Vermont (in a noncompetitive market)  
 Virginia (residual market and uninsured coverage)  
 Washington  
 West Virginia  
 Wyoming (in a noncompetitive market)

### (3) File and Use

Arizona (in a noncompetitive market)  
 Colorado (rating data)  
 Connecticut (in a competitive market)  
 Florida  
 Georgia  
 Indiana  
 Maine  
 Michigan (private passenger in a competitive market)  
 Minnesota  
 New York (informational filing in a competitive market)  
 North Carolina (commercial)  
 Ohio (commercial in a competitive market and all other auto)

Oregon  
 South Dakota  
 Utah (in a noncompetitive market)  
 Virginia (in a competitive market file on or before effective date; in a noncompetitive market file 60 days before effective date)  
 Virgin Islands

### (4) Use and File

Arizona (in a competitive market)  
 Florida  
 Idaho  
 Illinois (private passenger, taxicab and motorcycle rates)  
 Iowa (in a competitive market)  
 Kentucky (in a competitive market)  
 Missouri  
 New Jersey (commercial)  
 Tennessee (commercial)  
 Utah (in a competitive market)  
 Vermont (in a competitive market)  
 Wisconsin

### (5) Flex-Rating

New Jersey (private passenger)  
 New York (commercial)  
 Texas (state board of insurance sets benchmark and flex band)

## II. PROPERTY-CASUALTY GENERALLY

### (1) Strict Prior Approval

Delaware  
 District of Columbia (property)  
 Nevada  
 Oklahoma (if rate change exceeds 15%)

**(2) Prior Approval With Express Deemer**

Alabama  
 Alaska  
 Arkansas  
 California  
 Connecticut (personal lines in a noncompetitive market)  
 Florida  
 Hawaii  
 Iowa (in a noncompetitive market)  
 Kansas  
 Kentucky (in a noncompetitive market, or if rate change exceeds 25% within 12 months, or if residual market rate)  
 Louisiana  
 Maryland  
 Michigan  
 Mississippi  
 Missouri (commercial casualty if rate change exceeds 25% annually)  
 Nebraska  
 New Jersey  
 New Mexico  
 New York (in a noncompetitive market)  
 North Dakota  
 Ohio (property and commercial casualty in a noncompetitive market)  
 Oklahoma  
 Oregon (commercial liability specified by regulator)  
 Pennsylvania  
 Puerto Rico  
 Rhode Island  
 South Carolina  
 South Dakota  
 Tennessee  
 Vermont (in a noncompetitive market)  
 Washington  
 West Virginia  
 Wyoming (in a noncompetitive market)

**(3) File and Use**

Arizona (in a noncompetitive market)  
 Colorado (rating data)  
 Connecticut (in a noncompetitive market)  
 Florida  
 Georgia  
 Indiana  
 Maine  
 Massachusetts  
 Minnesota  
 New York (informational filing in a competitive market)  
 North Carolina  
 Ohio (casualty)  
 Oregon  
 Utah (in a noncompetitive market)  
 Virginia (in a competitive market file on or before the effective date; in a noncompetitive market file 60 days before the effective date)  
 Virginia Islands

**(4) Use and File**

Arizona (in a competitive market)  
 Florida  
 Idaho  
 Illinois (liquor liability)  
 Iowa (in a competitive market)  
 Kentucky (in a competitive market)  
 Missouri  
 Tennessee (commercial)  
 Texas  
 Utah (in a competitive market)  
 Vermont (in a competitive market)  
 Wisconsin

### III. WORKERS' COMPENSATION

#### (1) Strict Prior Approval

Delaware  
 District of Columbia  
 Florida  
 Minnesota \* (commissioner may require approval in  
 a noncompetitive market)  
 New Hampshire  
 New Jersey  
 New York  
 Oklahoma (if rate change exceeds 15%)  
 Tennessee

#### (2) Prior Approval With Express Deemer

Alabama \*  
 Alaska \*  
 Arkansas  
 Colorado \*  
 Connecticut \*  
 Hawaii \*  
 Idaho \*  
 Illinois (in a noncompetitive market)  
 Indiana \*  
 Iowa  
 Kansas  
 Kentucky \* (in a noncompetitive market)  
 Louisiana \*  
 Maryland \*  
 Massachusetts  
 Mississippi  
 Nebraska \*  
 New Mexico \*  
 North Carolina

\* In these states the bureau files loss costs. Nevada, North Dakota, Ohio, Washington, West Virginia, Wyoming, Puerto Rico and the Virgin Islands are state monopoly funds and therefore do not provide private insurance.

Oklahoma  
 Oregon \*  
 Pennsylvania  
 Rhode Island \*  
 South Carolina \*  
 South Dakota  
 Vermont \* (in a noncompetitive market)  
 Virginia  
 Wisconsin

#### (3) File and Use

Arizona  
 Michigan \*  
 Minnesota \* (in a noncompetitive market)  
 Utah

#### (4) Use and File

Illinois (in a competitive market)  
 Kentucky \* (in a competitive market)  
 Minnesota \* (in a competitive market)  
 Vermont \* (in a competitive market)

### IV. HOMEOWNERS

#### (1) Strict Prior Approval

Delaware  
 District of Columbia  
 Nevada

#### (2) Prior Approval With Express Deemer

Alabama  
 Alaska  
 California  
 Connecticut (in a noncompetitive market)  
 Florida  
 Hawaii  
 Iowa (in a noncompetitive market)



Kansas  
 Kentucky (in a noncompetitive market, or if rate  
 change exceeds 25% within 12 months, or if resid-  
 ual market rate)  
 Louisiana  
 Maryland  
 Michigan (in a noncompetitive market)  
 Mississippi  
 Nebraska  
 New Jersey  
 New Mexico  
 New York (in a noncompetitive market)  
 North Carolina  
 North Dakota  
 Ohio  
 Pennsylvania  
 Puerto Rico  
 Rhode Island  
 South Carolina  
 South Dakota  
 Tennessee  
 Vermont (in a noncompetitive market)  
 Virginia (residual market)  
 Washington  
 West Virginia  
 Wyoming (in a noncompetitive market)

### (3) File and Use

Arizona (in a noncompetitive market and assigned  
 risks)  
 Colorado (rating data)  
 Connecticut (in a competitive market)  
 Florida  
 Georgia  
 Indiana  
 Maine  
 Massachusetts

Michigan (in a competitive market)  
 Minnesota  
 New York (informational filing in a competitive  
 market)  
 Oklahoma  
 Oregon  
 Utah (in a noncompetitive market)  
 Virginia (in a competitive market file on or before  
 effective date; in a noncompetitive market file 60  
 days before effective date)  
 Virgin Islands

### (4) Use and File

Arizona  
 Florida  
 Idaho  
 Illinois (dwelling fire and allied lines)  
 Iowa (in a competitive market)  
 Kentucky (in a competitive market)  
 Missouri  
 Utah (in a competitive market)  
 Vermont (in a competitive market)  
 Wisconsin

### (5) Flex-Rating

Texas (State Board of Insurance promulgates the  
 benchmark rate and the flex band)

**BEST AVAILABLE COPY**

### QUESTION PRESENTED

Whether the federalism principles that undergird the state action doctrine, coupled with principles of fundamental fairness, permit the imposition of federal antitrust liability upon persons acting pursuant to a lawful state regulatory regime, on the basis of a subsequent determination by a federal antitrust tribunal that the state's implementation of its regulatory regime was not effective.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

No. 91-72

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

TICOR TITLE INSURANCE CO., *et al.*,

*Respondents.*

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION  
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The American Land Title Association ("ALTA") is a voluntary trade association comprised of title insurance underwriters, agents, attorneys and others involved in the conveyance of real property throughout forty-nine states, the District of Columbia, and the territories. The business of ALTA's members is uniquely local in nature, and is the subject of state regulatory scrutiny in each of the states in which its members conduct business. The insurance functions of ALTA's members are, and have always been, conducted pursuant to pervasive state regulation and extensive oversight by state insurance departments.

ALTA and its constituency view the issues raised in this case to be of critical importance. The test of active supervision advanced by the petitioner will, if adopted, undermine the confidence of regulated entities in the integrity of state regulatory processes, and will thereby undermine state regulation itself. The very facts of this case under-



score the need for this Court to adopt a test of active supervision that will lend credibility to state regulation, and thereby provide certainty to regulated entities that they will not become the unwitting subjects of federal antitrust attack for the mere act of conducting themselves in accordance with state law.<sup>1</sup>

### STATEMENT OF THE CASE

On January 7, 1985, petitioner Federal Trade Commission ("FTC" or the "Commission") initiated an enforcement action alleging that six title insurance companies had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (the "FTC Act"), by filing title insurance rates with state insurance regulators through state authorized rating bureaus in thirteen states. Pet. App. at 44a. Prior to the administrative hearing, and following this Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), the FTC staff announced its decision not to pursue its claims against the insurers in five states. The case then proceeded to hearing with respect to the rating bureau activities of the title insurers in eight states.

On December 22, 1986, the Administrative Law Judge ("ALJ") found, *inter alia*, that the five title insurance companies<sup>2</sup> had violated the FTC Act in two states, but that the state action doctrine protected the challenged conduct in the remaining six states. Pet. App. at 248a. The insurance companies and the FTC complaint counsel cross-appealed the ALJ decision to the full Commission. Pet. App. at 45a.

On September 19, 1989, the Commission issued its Opinion and Final Order. Pet. App. at 44a. The FTC, which concluded, *inter alia*, that the state action doctrine did

<sup>1</sup> Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of the Petitioners and Respondents. Letters of consent from all parties are being filed concurrently herewith.

<sup>2</sup> The sixth title insurance company originally charged entered into a consent agreement with the FTC. Pet. App. at 137a n.1.

not shield the rate filing activities of the title insurers, found a violation of the FTC Act in Arizona, Connecticut, Montana, New Jersey, Pennsylvania, and Wisconsin. Pet. App. at 46a.<sup>3</sup> The Commission's decision on the state action issue generated three separate opinions (plus one additional statement) from the three participating Commissioners. Pet. App. at 44a.<sup>4</sup>

The title insurance companies appealed the decision of the Federal Trade Commission to the United States Court of Appeals for the Third Circuit, which, on January 9, 1991, reversed the FTC's Opinion and Final Order in its entirety. *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991), Pet. App. at 1a. The Third Circuit held that the filing by the title insurance companies of rates through state licensed rating bureaus in the states at issue was authorized and was actively supervised by those states. Pet. App. at 38a. It rejected the FTC's approach to active supervision as overly intrusive, and adopted a test that it described as more in keeping with the federalism underpinnings of the state action doctrine as enunciated by this Court. Pet. App. at 57a.

In July of 1991, the FTC petitioned this Court for a writ of certiorari. That petition was granted on October 7, 1991.

### SUMMARY OF ARGUMENT

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court held that the federal antitrust laws could not be employed to invalidate a state regulatory program. The state action doctrine that emerged from this holding provides that con-

<sup>3</sup> Although the Third Circuit below reversed the FTC's decision with respect to state action in Pennsylvania and New Jersey, that aspect of the Third Circuit's decision is not a subject of review before this Court.

<sup>4</sup> The two other active Commissioners did not register votes in this case. The fourth vote of the FTC came from former Chairman Oliver, who registered his vote prior to leaving the Commission. Pet. App. at 41a, 43a.

duct undertaken pursuant to a state regulatory program is exempt from federal antitrust attack.<sup>5</sup> Grounded in principles of federalism, it is a doctrine that commands that the states must be free to engage in legitimate regulation of economic activities within their borders without undue interference by the federal government. It is also a doctrine that recognizes that, in order for states to regulate effectively, regulated entities must be able to rely upon the integrity of the state regulatory process.

The FTC's approach to active supervision in this case undermines the very goals that the doctrine was established to promote. The Commission's test invites rigorous substantive scrutiny of state regulatory determinations by federal antitrust tribunals. This approach to the *Parker* doctrine, and indeed any test that invites the federal antitrust camel to stick its nose into the state regulatory tent, cannot be reconciled with this Court's own admonition that states must be free to experiment with economic regulation without intrusion by federal antitrust tribunals.

The Court of Appeals below, while properly rejecting the Commission's interpretation of the state action doctrine, nevertheless adopted a test that invites federal scrutiny of the substance of state regulatory conduct. And though the Third Circuit's application of that test to the facts of this case avoided such scrutiny, the test itself offers no certainty that future federal tribunals will exercise such restraint.

The only test of active supervision that is fully consistent with this Court's teachings is one that focuses exclusively on the structure of a state's regulatory program, without in any way looking behind that structure to the actual conduct of the state regulator. This objective test of active supervision is the proper test for several reasons. First, by focusing exclusively upon the regulatory regime

<sup>5</sup> The instant case involves the application of the state action doctrine to the conduct of private parties who are subject to state regulation. The issue of municipal state action, to which a different test is applied, is not raised by this case.

itself and not upon the effectiveness, wisdom or correctness of its implementation, a structural, or objective test is the only approach that is fully responsive to the federalism principles that lie at the core of the state action doctrine. Second, it is the only approach that prevents parties from utilizing federal antitrust processes to remedy perceived imperfections in the performance of state regulatory functions. Third, the objective test protects against the use of liberal federal discovery rules to invade the deliberative processes of state actors. Finally, it is the only approach to active supervision that avoids resting the liability of private actors on the subsequent conduct of state regulators—a blend of *ex post facto* and vicarious liability that strains and could easily exceed the boundaries of due process. The objective test also possesses the virtue of simplicity; it is easy to apply and administer, and it properly steers the federal courts away from complex intrusions into state regulatory activity.

## ARGUMENT

In the decision below, the Court of Appeals held that the record of state supervision over title insurance rating bureaus in Arizona, Connecticut, Montana, and Wisconsin satisfied the requirements of the state action doctrine.<sup>6</sup> Accordingly, the Court of Appeals reversed the Opinion and Final Order of the FTC, which held that the title insurance companies had violated the federal antitrust laws by participating in state authorized rating bureaus. 922 F.2d 1122, Pet. App. at 1a-40a.

The Court of Appeals refused to accept the FTC's notion that state action protection is only available to private parties after a federal antitrust tribunal has conducted a *de novo* review of state agency action and has determined that the state regulators properly balanced the interests

<sup>6</sup> The question of whether these states had clearly articulated and affirmatively expressed policies removing title insurance ratemaking from the competitive sphere and placing it within a sphere of state regulation was not contested in this case.

of state policy against the federal goals of unfettered competition. Relying on the underlying purposes of the state action doctrine, the Third Circuit concisely laid waste to the FTC's approach to active supervision:

The FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Midcal's* adequate supervision prong because the regulators in those states were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable. Even if the FTC is correct, its conclusions miss the point. Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable.

922 F.2d at 1140, Pet. App. at 37a.

The test adopted by the Third Circuit attempts to embrace the federalism concerns that lie at the core of the state action doctrine, but falls short. Its test properly inquires whether a state regulatory program (1) is in place, (2) is staffed and funded, (3) grants regulators the power and duty to regulate pursuant to declared standards of state policy, and (4) is enforceable in the state's courts. Pet. App. at 28a (citing *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1071 (1st Cir. 1990)). However, it also requires a showing of some "basic level of activity" by state regulators. *Id.* By inviting federal inquiry into the "basic level" of state regulatory activity, the Third Circuit's test opens the door to the same wholesale intrusion into state regulatory processes by federal antitrust tribunals that served as the basis for its rejection of the FTC's test. The only difference between the two approaches is that the Third Circuit applied its test in a manner that was properly deferential to state regulatory

autonomy, while the FTC applied its test with no semblance of such deference. There is no guarantee, however, that future tribunals applying the Third Circuit's test will be so restrained.

A purely objective test of active supervision inquires into the existence of a comprehensive regulatory regime designed to promote state rather than private ends, without looking to the effectiveness of the state's implementation of its regime. This is the only approach to active supervision that advances the federalism goals of the state action doctrine and avoids the myriad problems that the tests proposed by the FTC and the Third Circuit would produce.

# **I. The State Action Doctrine Does Not Permit Federal Tribunals To Look Behind The Structure Of State Regulatory Programs To The Actual Substance And Effectiveness Of Regulatory Conduct.**

## **A. The Principal Focus Of The State Action Doctrine Is The Preservation Of State Regulatory Autonomy Free From Federal Interference.**

As this Court made clear in *Parker*, principles of federalism lie at the very heart of the state action doctrine. *Parker* involved a federal antitrust challenge to a state run program governing the marketing of California's raisin crop. This Court evaluated the challenged state program and concluded that it was not the product of private agreement; rather, it "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350. Furthermore, this Court found that it was neither in the language nor in the purposes of the Sherman Act to restrain a state or its agents from activities directed by its legislature. "In a dual system of government, in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351. Accordingly, in deference to the primacy of state economic reg-



ulation, this Court rejected the plaintiff's Sherman Act challenge.

This Court revisited the *Parker* doctrine in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), where a Sherman Act attack was directed against a state liquor pricing program under which wine producers, wholesalers, and rectifiers were required to file price schedules with the state. The governing statute, however, did not give the state direct control over the prices, nor did it enable the state to review the reasonableness of the posted prices. *Id.* at 99-100. For this reason, this Court found that the regulatory program at issue violated the Sherman Act.

In reaching its conclusion, this Court briefly surveyed its own previous applications of the *Parker* doctrine, and defined a two-pronged test for state action immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted). The Court then applied this test to the liquor pricing mechanisms under attack. It found prong one to be easily satisfied, because "[t]he legislative policy [was] forthrightly stated and clear in its purpose to permit resale price maintenance." 445 U.S. at 105.

The Court was not persuaded, however, that the second prong of the *Midcal* test—active supervision—had been satisfied, because:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak

of state involvement over what is essentially a private price-fixing arrangement.

445 U.S. at 105-106 (footnote omitted). This Court nevertheless emphasized that the state action doctrine, and the two-pronged test formulated thereunder, "is grounded in our federal structure" pursuant to which, "under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Id.* at 103.

In 1985, this Court strongly reaffirmed the federalism underpinnings of the state action doctrine. In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), motor common carrier rate bureaus in five states were sued for violating the Sherman Act by filing joint rate proposals with state regulators pursuant to permissive, rather than compulsory, regulatory programs. The rate bureaus' state action immunity arguments were rejected by the United States Court of Appeals for the Fifth Circuit, which held that compulsion was a threshold requirement for satisfying the first prong of the *Midcal* test. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983)(*en banc*).

This Court reversed the Fifth Circuit's state action holding, concluding that actions undertaken by private parties may be attributed to a "clearly articulated state policy" within the meaning of *Midcal*'s first prong, even in the absence of compulsion. 471 U.S. at 59-60. In reaching its conclusion, this Court bridged the 45-year history of the state action doctrine and reasserted the principles that lay at the core of the Court's decision in *Parker*. Addressing the dichotomy between competition and state regulation, *Southern Motor Carriers* made clear which factor predominates, stating that "[t]he *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Id.* at 56 (footnote omitted). *Southern Motor Carriers* thus concluded that a compulsion requirement was inconsistent with the feder-

alism underpinnings of the state action doctrine because "[i]t reduces the range of regulatory alternatives available to the State." *Id.* at 61.

The unmistakable focus of these decisions is a recognition that the state action doctrine was intended to preserve state "regulatory alternatives" by giving states broad flexibility to control economic activities within their borders. In *Parker*, the Court strongly endorsed the primacy of state economic regulation, absent express federal preemption. The *Southern Motor Carriers* decision flatly rejected any test of state action that "would prompt the 'kind of interference with state sovereignty . . . that . . . *Parker* was intended to prevent.'" *Id.* at 57-8 n.20 (quoting 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 214, p. 88 (1978)). And in *Midcal*, this Court relied upon the deferential basis of the state action doctrine to fashion a two-pronged test that focused upon the structure rather than the execution of state regulatory programs.

These decisions demonstrate that the primary goal of the state action doctrine is to preserve state regulatory autonomy. Although the Third Circuit's application of its active supervision test was fully responsive to these federalism concerns, neither its test nor that of the FTC will protect states or regulated entities from substantive federal review. Only a test of active supervision that looks solely at the existence of a comprehensive regulatory structure, without allowing the federal government to look behind that structure, can serve the true purposes of the state action doctrine.

**B. An Objective Test Of Active Supervision Is Fully Consistent With *Patrick v. Burget* And With The Holdings Of The Appellate Courts That Have Addressed This Issue.**

This Court's most recent effort to define the parameters of the active supervision prong of the *Midcal* test can be found in *Patrick v. Burget*, 486 U.S. 94 (1988). Patrick was an Oregon surgeon who brought an antitrust challenge against a hospital peer review committee that terminated

his staff privileges at the only hospital in the community. The defendants contended that the peer review process was protected from antitrust challenge under the state action doctrine because hospitals were required by state law to establish peer review procedures and review those procedures on a regular basis.

The Court concluded that "active supervision" had not been demonstrated, and rejected the state action defense. *Id.* at 100. It explained that the active supervision requirement "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Id.* at 100-01 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985)). It then fashioned an approach to active supervision that applied to the specific facts of the case before it, concluding that:

[t]he active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

486 U.S. at 101.

With this legal framework in place, the *Patrick* Court reviewed the statutory mechanisms governing peer review practices in Oregon. It concluded on the basis of this statutory evaluation that the state regulators *could not* review hospital peer review decisions to determine whether such decisions comported with state regulatory policies, and that they could not correct any abuses. *Id.* at 102-03. Moreover, the statutory provisions governing state judicial review of peer review determinations limited such review to the procedural, rather than the substantive infirmities of peer review decisions. *Id.* at 104. This Court thus held, on the

basis of this survey of the Oregon statute that the active supervision requirement had not been met. *Id.* at 105.

Ignoring *Patrick's* narrow focus upon the absence of *statutory* mechanisms for state supervision of the private peer review process, the FTC in this case has relied on the "have and exercise" language of *Patrick* to justify a veritable ransacking of state regulatory records to determine whether the states "exercised" their regulatory authority or control in accordance with state policy. *See e.g.* Brief for Petitioner at 21. A closer look at the origins of this "have and exercise" language, however, cannot support such a reading.

There is no mystery surrounding the source of *Patrick's* "have and exercise" language; *Patrick* itself credits *Southern Motor Carriers* for the phrase. But *Southern Motors Carriers* plainly did not contemplate the intrusive construction of "have and exercise" that the FTC has advanced. In fact, this Court in *Southern Motor Carriers* concluded—*solely* by reference to the *statutory* provisions in place in those states—that the State Public Service Commissions under scrutiny "have and exercise ultimate authority and control over all intrastate [trucking] rates."<sup>7</sup> The very decision in which the phrase was first announced demonstrates, through its own usage, that it contemplates

<sup>7</sup> 471 U.S. at 50-51. This Court stated:

In North Carolina, Georgia, Mississippi, and Tennessee, Public Service Commissions set motor common carriers' rates for the intrastate transportation of general commodities. Common carriers are required to submit proposed rates to the relevant Commission for approval. A proposed rate becomes effective if the state agency takes no action within a specified period of time. If a hearing is scheduled, however, a rate will become effective only after affirmative agency approval. *The State Public Service Commissions thus have and exercise ultimate authority and control over all intrastate rates.*

*Id.* (emphasis added)(footnotes omitted). All supporting citations to the above-quoted language were to state statutory provisions. *Id.*

nothing more intrusive than a review of the governing statutory provisions.

Nor does a fair reading of *Patrick* suggest any intention on the part of this Court to require more than a system of regulatory oversight to satisfy the active supervision test; the holding was based upon the Oregon legislature's failure to provide its regulators with "*statutory authority*" to review the substance of the challenged peer review activities:

This *statutory scheme* does not establish a state program of active supervision over peer-review decisions. The Health Division's *statutory authority* over peer review relates only to a hospital's procedures; that authority does not encompass the actual decisions made by hospital peer-review committees. . . . The state does not actively supervise [the termination of staff hospital privileges] unless a state official has and exercises ultimate authority over private privilege determinations. *Oregon law does not give the Health Division this authority: under the statutory scheme the Health Division has no power to review private peer-review decisions and overturn a decision that fails to accord with state policy.*

486 U.S. at 102-03 (emphasis added)(footnote omitted).<sup>8</sup> This Court therefore concluded, on the basis of the Oregon statutes alone, that "the activities of the Health Division under Oregon law cannot satisfy the active supervision requirement of the state-action doctrine." *Id.*

<sup>8</sup> Throughout its decision, this Court in *Patrick* emphasized that its active supervision holding flowed from its review of the state's *statutory* mechanisms for supervision. *See, e.g., id.* at 102 n.6 (statutory scheme provides for only limited review of even the peer review procedures); *id.* at 103 and n.7 (statutory provisions governing state Board of Medical Examiners provides no mechanism for supervising peer review decisions); *id.* at 104 (state statutes do not provide for judicial review of privilege terminations).



This approach to active supervision, and the factual context in which it arose, was indistinct from the holding in *Midcal*, where the Court found supervision lacking because the statute at issue did not enable state regulators to "monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. at 106. Similarly, in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), this Court concluded that, where the state statute did not give the regulators authority to approve or disapprove of privately set price schemes, there was no active supervision because "[t]he state has displaced competition among liquor retailers without substituting an adequate system of regulation." *Id.* at 345 (emphasis added).

Each of these decisions rejected the state action defense because the governing statutes and regulations did not empower state regulators to supervise the conduct under attack. Significantly, both *Midcal* and *Duffy* discussed hypothetical state statutory programs that this Court felt would satisfy the active supervision requirement.<sup>9</sup> And in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1979), decided prior to *Midcal*'s formal enunciation of the active supervision requirement, this Court upheld the assertion of the state action defense based *solely* upon a review of the governing statutory regime. *Id.* at 109.

Indeed, although prior to this case this Court has never expressly addressed the active supervision issue in a context in which state laws actually provide for regulatory

<sup>9</sup> *Midcal*, 445 U.S. at 106 n.9 ("[t]he California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E.g.*, Va. Code §§ 4-15, 4-28 (1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker v. Brown*, since the State would 'displace unfettered business freedom' with its own power") (citations omitted); *Duffy*, 479 U.S. at 344-45 n.6 ("[a] simple 'minimum markup' statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the 'active supervision' requirement, and so be exempt from the antitrust laws under *Parker v. Brown*, 317 U.S. 341 (1943). See *Morgan v. Division of Liquor Control*, 664 F.2d 353 (2d Cir. 1981) (upholding a simple markup statute)").

oversight of private anticompetitive activity, the Courts of Appeals have done so on numerous occasions and have consistently refused to look behind the statutory scheme to the actual conduct of the state regulators. See, e.g., *Llewellyn v. Crothers*, 765 F.2d 769, 773-74 (9th Cir. 1985) (availability of state action immunity depends not upon a subjective review of the conduct of the regulators but upon the "satisfaction of the objective standards set forth in *Parker* and authorities which interpret it"); *Capital Telephone Co. v. New York Telephone Co.*, 750 F.2d 1154, 1163-64 (2d Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985) (finding active supervision on the basis of the existence of a comprehensive regulatory structure); *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (statutory authority of regulators to supervise physician peer review held to satisfy active supervision requirement); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir.), *cert. denied*, 459 U.S. 1022 (1982) (active supervision is a "question of law, generally an issue of statutory construction" which does not permit "inquiry into state legislative wisdom").

The undisputed statutory record in this case amply demonstrates the existence of comprehensive regulatory programs for the supervision of the rating bureaus and their members in Arizona, Connecticut, Montana, and Wisconsin. Joint App. at 166-211. In fact, the statutes governing the insurance rating bureaus in this case were at least as extensive as those that governed the motor carrier rate bureaus in *Southern Motor Carriers*—statutes that this Court found to have demonstrated that the state regulators "have and exercise ultimate authority and control over all intrastate rates." 471 U.S. at 50-51. Thus, this Court's state action holdings, as well as an unbroken line of appellate court precedents, demonstrates that the extensive, expansive, intrusive, and disruptively microscopic nitpicking of the state regulatory records that has occurred throughout the tortured history of this case is entirely inappropriate and unnecessary to the legal resolution of the active supervision question.

## II. An Objective Test of Active Supervision Precludes Federal Second Guessing Of State Regulatory Determinations.

The FTC's approach to the record in this case—drawn from the multiple opinions that comprised its Opinion and Final Order as well as from the various briefs filed on its behalf in this Court and the Court of Appeals—underscores the full range of second guessing that a federal tribunal can and will undertake under the guise of “unobtrusive” review of state action. In this case, such review ranged from seemingly nonintrusive findings that certain filings (typically minor endorsement filings) simply were not reviewed, to findings that the state regulator made the “wrong” decision based on the evidence presented to him.

On one end of the spectrum, for example, the record shows that state regulators allowed the initial rate bureau filings in two states to go into effect without requiring detailed supporting data. *See* Pet. App. at 60a-61a, 63a. The evidence further shows that the regulators concluded that this was appropriate, because the new rate bureaus had not had any opportunity to develop historical data with respect to a new filing, and because the initial rating bureau rates tracked the preexisting competitive rate in the respective markets. *Id.*; *see also* Joint App. at 3. The FTC felt differently, however, concluding that no active supervision occurs “[w]hen a state allows a historical rate to go into effect unexamined.” Pet. App. at 68a.

On the other end of the spectrum, the FTC's “unobtrusive” test of active supervision ignored unambiguous evidence of rigorous scrutiny by Arizona and Connecticut regulators of comprehensive rate filings in those states. Instead, relying on his experience as a former Interstate Commerce Commissioner, the author of the FTC opinion concluded that the personnel who reviewed the Arizona filing were not “sufficiently trained” to carry out this “very difficult task.” Pet. App. at 135a and n.17. As to the Connecticut filing, this same Commissioner concluded, despite testimony by the regulator that he had thoroughly

reviewed all aspects of the filing in question, that the regulator “should have disapproved the rates as excessive.” Pet. App. at 132a. Both of these filings were found by the FTC, under its supposedly deferential test of active supervision, not to have been actively supervised.

Neither of these extremes can be reconciled with the notion underlying the *Parker* doctrine that state regulators are to be given latitude to adopt flexible regulatory alternatives. Even a putatively nonintrusive form of federal substantive review, such as the “basic level of activity” test adopted by the Court of Appeals, violates the state action predicate because the regulator may well have concluded that his limited regulatory resources were better targeted elsewhere with respect to the filing in question.<sup>10</sup> In other words, even *apparent* inaction by a regulator with respect to a filing (*e.g.* the absence of paper in his or her files), may reflect a regulatory judgment on his part that the particular filing in question did not require utilization of limited regulatory resources.<sup>11</sup> A finding of no active supervision with respect to such a filing is nothing short of a federal substantive determination that the state official erred in exercising his regulatory judgment.

As the examples listed above demonstrate, any test of active supervision—including the Third Circuit's “basic level of activity” test—that invites federal scrutiny into the nature, rather than the existence, of state regulatory pro-

<sup>10</sup> Indeed, the record demonstrates that this is precisely what occurred in this case. *See e.g.*, Joint App. at 81 (regulator testified that his responsibilities include the determination of which rate filings require greater or lesser scrutiny).

<sup>11</sup> The fact that state troopers may not succeed in stopping every speeder, for example, does not mean that state speed limits are not being enforced. By the same token, a regulatory judgment that rate bureau filings will be reviewed randomly in an effort to preserve state regulatory resources may not strike a federal reviewing authority as the best form of supervision; nevertheless, such a determination would appear to represent the precise type of regulatory flexibility that the *Southern Motor Carriers* decision explained was so crucial in a state action context.



grams, places federal reviewers on the fabled slippery slope. The state action doctrine will cease to function as a rule governing regulated conduct, and will operate as an *ad hoc* tool subject, as this case demonstrates, to varied and inconsistent applications by federal tribunals. As such, it will offer no clear guidance to regulated entities, and will undermine the ability of states to carry out their regulatory regimes free from federal intrusion.

### III. An Objective Test Of Active Supervision Avoids Abuse Of State Regulatory Processes.

Both the FTC's test of active supervision and that of the Third Circuit would allow federal antitrust challenges to be based upon alleged misfeasance or nonfeasance of state regulators. Such tests impermissibly replace the state reviewing authority contemplated by the legislature with a federal reviewing authority operating pursuant to a different mandate. As this Court explained in *Hoover v. Ronwin*, 466 U.S. 558 (1984), "[t]he court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers." *Id.* at 574. For precisely these reasons, the First Circuit, in *New England Motor Rate Bureau*, rejected the FTC's attempt to inquire "into whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness," 908 F.2d at 1075, concluding that "[t]he FTC would, in effect, try the state regulator." *Id.*<sup>12</sup> The Third Circuit below properly adopted the First Circuit's reasoning, and rejected precisely the same intrusive FTC approach to active supervision.

"'Ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.' . . . A contrary rule would tempt aggrieved parties to forego available state corrective processes in hopes of obtaining the treble damages remedy

<sup>12</sup> The court held that the FTC's effort to sit "in judgment upon the degree of strictness or effectiveness with which a state carries out its own statutes" *id.* at 1076, "goes too far." *Id.* at 1075.

conferred by the Sherman Act." *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988). This is not merely a hypothetical possibility, but a demonstrated reality. One plaintiff's counsel, when asked by a district court why he did not exhaust his state law remedies for challenging a state administrative decision, candidly admitted that "we believe the antitrust laws apply and that's our remedy." *Metro Mobile CTS, Inc. v. Newvector Communications, Inc.*, 661 F. Supp. 1504, 1520 n.12 (D. Ariz. 1987), *aff'd*, 892 F.2d 62 (9th Cir. 1989).<sup>13</sup>

<sup>13</sup> This quoted excerpt from the district court opinion fails to do plaintiff's counsel full justice. The transcript of the argument demonstrates without ambiguity plaintiff's efforts to foreclose active supervision by moving to federal court before state regulatory procedures had been exhausted. After concluding that plaintiff's complaint focused on a regulatory determination that plaintiff thought to be in error, the following colloquy occurred:

Court: Why didn't you appeal at that time?

Counsel: Because we believe the antitrust laws apply and that's our remedy, Your Honor.

Court: But you'd also said the Corporation Commission indicated that it had rate setting authority and jurisdiction and you could have simply appealed that to superior court, and we wouldn't be here today. . . . You still haven't said why you didn't appeal that [regulatory action].

Counsel: Because, Your Honor, we—we—we believe we did not want retail rate regulation, and we knew we had remedies elsewhere. . . .

Court: So that your answer is that you just felt that you didn't have to appeal it, that you had an action here for treble damages?



Any test of active supervision that invites federal review of the actual conduct of state regulators promotes precisely such forum shopping by placing in the hands of potential plaintiffs the power to control the presence or absence of state supervision. In other words, by failing to avail himself of the full range of regulatory remedies provided by a state, an antitrust plaintiff can manufacture the absence of active supervision under a state action test that scrutinizes the substance of state regulatory conduct.<sup>14</sup> Such a regime would enable "aggrieved parties to forego available state corrective processes in hopes of obtaining the treble damages remedy conferred by the Sherman Act." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

In addition, a test that invites federal review of whether a state regulator "properly" performed his or her statutory duties—or was qualified to perform them<sup>15</sup>—inevitably

Counsel: Your Honor, at this point . . . we don't want rate of return rate regulation. We don't want rate of return wholesale rate regulation. We're in favor of competition. That's why we didn't—we don't want the [regulator] to assert rate regulation over retailing. That's why we didn't appeal.

*Id.* (Transcript at 47-51).

<sup>14</sup> As one noted antitrust scholar has explained:

State laws intended to displace the antitrust laws may delegate to public agencies or officials the power to act, decide, or regulate in order to achieve anticompetitive results. Of course, state law "authorizes" only agency decisions that are substantively and procedurally correct. Errors of fact, law or judgment by the agency are not "authorized," and state tribunals will normally reverse erroneous acts or decisions. If the antitrust court demands unqualified "authority" in this sense, it will inevitably become the standard reviewer of governmental agencies whenever it is alleged that the agency, though possessing the power to engage in the challenged conduct, has exercised its power erroneously.

P. Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 HARV. L. REV. 435, 449-50 (1981).

<sup>15</sup> See Pet. App. at 135a and nn. 15-18.

will open the doors to invasive federal discovery of the state regulatory process. Already protracted discovery will be further expanded (as occurred in this case) as testimony of regulators and their staffs is demanded and regulatory files are scoured by private or public federal litigants. This Court has cautioned against this very situation in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), where it rejected the plaintiff's efforts to craft a conspiracy exception to the state action doctrine, in part because "[t]his would require the sort of deconstruction of the governmental process and probing of official 'intent' that we have consistently sought to avoid." 111 S. Ct. at 1352.

As Justice Kennedy explained while sitting as a judge on the Ninth Circuit:

[A]ntitrust immunity springs from an essential principle of federalism, the necessity to respect a sovereign capacity in the several states. Given this purpose, it follows that actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law.

\* \* \* \*

The availability of immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it.

765 F.2d at 774; see also *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633, mem. op. and order (E.D. Pa. June 10, 1986) ("the 'active supervision' element of the state action defense focuses on the required procedures by which the state controls the challenged setting of prices, not the behavior or effectiveness of individual state employees in carrying out those procedures"). Consistent with these admonitions, an objective test of active supervision focuses upon state pro-

cedures, and thus avoids the problems inherent in the tests employed by the FTC and the Court of Appeals. Under such an objective test, "[a] federal Court's role in assessing active supervision is limited to whether provisions for regulatory oversight exist, and, if necessary, whether the specific conduct alleged to be anticompetitive is included as a part of the regulatory oversight." *Metro Mobile*, 661 F. Supp. at 1520.

Under this structural approach, a plaintiff aggrieved by the conduct of state regulatory activity must exhaust available state remedies; a plaintiff may assert that active supervision is lacking only if no mechanism is provided by state law for the review and correction of state regulatory inadequacies, *Patrick*, 486 U.S. at 104-05, because only then can it properly be argued that the state has shrouded private anticompetitive conduct in a "gauzy cloak" of state involvement. *Midcal*, 445 U.S. at 106. Abuses, mistakes or other irregularities in the statutorily established state regulatory structure cannot, consistent with *Parker* and its progeny, become the subject of federal antitrust review.

#### **IV. An Objective Approach To Active Supervision Avoids Fundamental Fairness Concerns That Easily Could Rise To Constitutional Dimensions.**

Although the constitutional ramifications of the FTC's approach to the state action doctrine have not been addressed by the parties, this Court should consider these issues in the course of formulating its holding with respect to the proper parameters of the active supervision standard. The manifest unfairness of the FTC's approach throughout this case is evidenced by the fact that the respondent title companies engaged in precisely the same conduct pursuant to virtually identical regulatory regimes in each of the states at issue before the FTC, but their federal antitrust liability varied from state to state.

More telling still is the fact that the various Federal Trade Commissioners could not even agree among themselves, let alone with their ALJ, as to which states actively supervised the challenged conduct under the Commission's

"test" of active supervision. The FTC's own confusion regarding the proper application of its test underscores the fact that any test of active supervision that centers on the actual conduct of state regulators provides no meaningful notice to regulated entities concerning when their actions will violate the federal antitrust laws, holds these entities accountable for the regulatory imperfections of independent third parties, and imposes liability retroactively and without adequate warning. An objective test that looks solely to the state's mechanisms for regulatory review eliminates all of these concerns.

#### **A. An Objective Test Of Active Supervision Provides Adequate Notice Of Whether Regulated Private Conduct Will Violate Federal Antitrust Laws.**

Any test of active supervision that renders a private actor's antitrust liability dependent upon the subsequent conduct of uncontrolled and uncontrollable third parties is not sufficiently definite to withstand constitutional scrutiny. It is a fundamental tenet of due process that "any legal standard must, in theory, be capable of being known." O.W. Holmes, *THE COMMON LAW* 89 (M.D. Howe ed. 1963). Because a "man is free to steer between lawful and unlawful conduct," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), this Court has consistently insisted "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* When a standard is based upon the subsequent conduct of uncontrollable third parties, however, the standard is incapable of ascertainment, and a person of ordinary intelligence cannot control his conduct to insure that it remains lawful; a standard so based thus undermines a core principle of due process that persons must have notice of the conduct for which they may be punished.

In the criminal context, this Court has consistently required that a penal statute "fairly and clearly define the conduct made criminal and the punishment which can be administered." *Berra v. United States*, 351 U.S. 131, 139



(1956). This Court has not hesitated to invalidate a statute where the statute does not fix "an ascertainable standard of guilt, . . . adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); see also, *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925).

The due process principles enunciated in *Cohen Grocery* and *Berra* are equally applicable in the civil context. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *A.B. Small*, 267 U.S. at 238-40. In *Giaccio*, this Court invalidated a Pennsylvania statute that allowed juries to impose court costs on an acquitted defendant. The Pennsylvania Supreme Court had held that the statute did not violate the due process clause because it was not a "penal statute," but simply provided a mechanism for the collection of costs of a "civil character." This Court rejected that approach and concluded that the protections of due process are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." 382 U.S. at 402.

Similarly, in *A.B. Small*, this Court held that the ground on which it had made its judgement in *Cohen Grocery*, i.e. that a statute must be sufficiently definite to inform persons accused thereunder of the nature and cause of the accusation against them, "applie[d], and with like consequences, to civil suits as well." 267 U.S. at 240. This Court concluded that the defendant's attempt to distinguish *Cohen Grocery* on the ground that it involved a criminal prosecution was unpersuasive, *id.* at 239, and held that:

The ground or principle of the decision[] was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

*Id.* Regardless of whether the context is civil or criminal, "[a] prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty." *Id.* at 240.

A subjective test of active supervision gives rise to precisely these same vagueness concerns, and should be rejected.<sup>16</sup> Under such a subjective test, the challenged conduct becomes blameworthy, if at all, not when it occurs, but only after it has been judged in relation to the activity of state regulators. Short of simply abstaining from state authorized activities, there is no fairly and clearly defined standard by which a person of "ordinary intelligence" could conduct himself. Abstinence, however, is really no alternative at all because it is fundamentally at odds with the very purpose of the state action doctrine—the promotion of regulatory autonomy—and is little different than the compulsion requirement struck down by the Supreme Court in *Southern Motor Carriers* as being irreconcilable with the federalism basis of the state action doctrine.

#### **B. An Objective Test Of Active Supervision Avoids The Possible Imposition Of Improper *Ex Post Facto* Liability.**

As amply demonstrated by the record in this case, the Commission's approach to active supervision invites *ad hoc*

<sup>16</sup> The FTC held that, stripped of the state action defense, respondents' activities "have been shown to constitute pernicious antitrust violations." Pet. App. at 108a. Consequently, it would undoubtedly contend that there is no vagueness issue presented by its test of active supervision, because the parties are on notice that price fixing is illegal. This approach, however, flips the state action doctrine on its head. State economic regulation is not first preempted by the federal antitrust laws and then subject to an immunity under the state action doctrine. Rather, the doctrine is premised on the *exclusion* of state regulation from the application of federal antitrust laws. Consequently, in order for a state action test to avoid the notice problem discussed above, it must provide certainty to entities operating pursuant to lawful state regulation as to when their conduct may nevertheless violate federal antitrust laws.



federal reinterpretation of state regulation, which may then be retroactively applied to the conduct of private actors to impose antitrust liability. This application of the active supervision requirement operates like an *ex post facto* law; it subjects private actors to the very real prospect of criminal or punitive antitrust liability solely on the basis of the action or inaction of the state regulators undertaken *after* the private actors have engaged in the challenged conduct.

The due process requirement of prior notice applies also to retroactive application of a new judicial construction of a statute. "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). In *Bouie* the Court observed that:

an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a crime, or makes it greater than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390. If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

*Id.* at 353-54.<sup>17</sup>

<sup>17</sup> See also *United States v. Lang*, 361 F. Supp. 380 (C.D. Cal. 1973) (holding that where legal definition of obscenity was substantially changed by the Supreme Court after defendants had mailed the accused matter prosecuting defendants would be functional equivalent of *ex post facto* application of the law); *Meads v. United States*, 156 F. Supp. 938, 940 (Ct. Cl. 1957) ("Parties should not be deprived of rights, established

Where the antitrust liability of private actors depends upon a federal tribunal's subsequent determination of whether the state regulators have properly performed their duties, the same infirmities that have caused the courts to strike down *ex post facto* laws come into play. A test of active supervision that invites federal tribunals to put state regulators on trial in this manner, and to use the results of those trials to determine the antitrust liability of regulated private parties, places those parties at grave risk that they will be found liable for antitrust violations stemming from a federal reinterpretation of state law. This Court should reject any test of active supervision that creates such a risk.

### C. An Objective Test Of Active Supervision Avoids The Imposition Of Vicarious Liability On Private Parties Acting In Accordance With The Provisions Of State Law.

Any test of active supervision that hinges on the actual conduct of state regulators predicates a person's antitrust liability on the actions of third parties over whom that person has no control; it thus also raises due process concerns by impermissibly imposing vicarious liability on an innocent party. Vicarious liability has been described as the "shifting of full responsibility to a blameless party, based on the party's relationship or policy considerations." *Minpeco, S.A. v. Conticommodity Services, Inc.*, 677 F. Supp. 151, 159 n.14 (S.D.N.Y. 1988). In the absence of culpability, courts impose vicarious liability only in extremely limited circumstances.

In the criminal context, the United States Supreme Court considered the due process limitations on vicarious liability in *Scales v. United States*, 367 U.S. 203 (1961):

In our jurisprudence guilt is personal and when the imposition of punishment on a status or on

---

by prior judicial decision and relied upon when the transaction was entered into, by a change in the interpretation of the law, pronounced after the transaction.").

conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

*Id.* at 224-25; see also, *Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978)(prosecutor's remarks to jury attempting to "tar defendant with vicarious responsibility for an expletive uttered in open court by a spectator" denied defendant due process of law).

The courts' reticence in holding a person liable for the conduct of another where no "sufficiently substantial" relationship exists is equally evident in the civil context. In *Amoco Oil Co. v. Environmental Protection Agency*, 543 F.2d 270 (D.C. Cir. 1976), the court struck down an Environmental Protection Agency regulation that imposed civil liability on a gasoline refiner for the negligent sale of leaded gasoline by a gasoline retailer. The Court of Appeals for the D.C. Circuit summarized the views of numerous commentators:

Generally, vicarious liability may be imposed upon a non-negligent person by reason of some closely integrated relationship existing between him and the negligent party. The essence of such relationship is that the person to whom the negligence is imputed has sufficient control over the acts of the negligent party to justify the conclusion that he is responsible for what happened.

*Id.* at 276 (citations omitted).

Similarly, in *Continental Aircraft Sales v. McDermott Brothers Co.*, 316 F. Supp. 232 (M.D. Pa. 1970), the court, in determining whether the negligence of the employee of the defendant corporation could be imputed to the employee of a third-party defendant corporation, held that "[n]egligence in the conduct of one party will not be imputed to another party if the latter party neither author-

ized such conduct nor participated therein, nor had the right or power to control it." *Id.* at 235.

In the present case, the conduct which ultimately determined the culpability of the rating bureau participants was that of third parties over whom the rating bureaus have no right or power to control, no relationship of agency or employment, nor any other relationship "sufficiently substantial" to allow the courts to shift "full responsibility to a blameless party." The underlying unfairness of the imposition of liability upon the respondent title insurers for the misfeasance or nonfeasance of state regulators is palpable. The vicarious liability inherent in such a test of active supervision, therefore, cannot be reconciled with the commands of due process and should be rejected.

### CONCLUSION

The Tenth Amendment of the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Relying on this constitutional notion of state sovereignty, the Supreme Court, in *Parker*, fashioned the state action doctrine as a means of protecting state economic regulation from encroachment by federal antitrust laws.

An objective test of active supervision fully comports with these purposes of the state action doctrine. Such an approach invites a federal reviewing authority to look only at the mechanisms established by a state for supervising regulated private parties. By limiting federal review in this manner, this structural test prevents federal tribunals from second-guessing the wisdom or quality of state regulatory determinations, and preserves for the states the full range of regulatory autonomy found to be so crucial by the Supreme Court in *Southern Motor Carriers*. This test also precludes efforts by private parties to circumvent state regulatory programs by pursuing spurious federal damage claims against parties subject to the process and protection

of state law. Finally, the objective test of active supervision provides clear and unmistakable guidance to regulated entities concerning what nominally regulated activities will be subject to the protections of state law. As such, it is the only test of active supervision that avoids paralyzing state regulatory flexibility, because it enables regulated entities to make fully informed decisions before participating in permissive state regulatory programs.

The "active supervision" prong should be interpreted to provide assurance both to states and to regulated entities that state regulatory programs may be implemented. "Active supervision" means that states must have a regulatory mechanism of oversight in place. Once state law provides for such a supervisory mechanism, private parties must be entitled to act pursuant to such state policy; otherwise, the federalism notions at the heart of the state action doctrine, and the doctrine itself, become a hollow shell.

Respectfully submitted,

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BRIEF OF AMICI STATES CALIFORNIA,  
COLORADO, NEBRASKA AND SOUTH DAKOTA  
IN SUPPORT OF RESPONDENTS

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**QUESTION PRESENTED**

Whether States must exercise their authority in regulating private parties (for purposes of the implied exemption from federal antitrust law) by affirmatively reviewing and approving each anticompetitive act of those parties, subject to oversight by the Federal Trade Commission as to the quality or level of the State review and approval.

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No. 91-72

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—◆—

INTEREST OF AMICI CURIAE STATES  
URGING AFFIRMANCE

*Amici* States urging affirmance have an obvious sovereign interest in preserving their authority to adopt and implement their own regulatory programs. Under our system of federalism, States are free to enact laws which effectively displace competition with regulation designed to further state goals and policies independent of the federal antitrust policies found in the Sherman Act. *Amici* States believe the Third Circuit Court of Appeals in this case properly struck the balance between respect for the

States' sovereign capacity to regulate private entities to meet those State goals and exposure of these entities to federal antitrust law.

While States may act *parens patriae* to enforce federal antitrust law within their boundaries, they are also free to regulate private parties in such a way as to immunize those parties from federal antitrust law. It is for the *States* to decide, by legislation and regulation of the private parties, whether anticompetitive conduct will be sanctioned. *Amici* States have a significant interest in protecting their right to so decide. If States decide their interest in regulating is less than their interest in competition, they are free to decide legislatively to expose private parties to antitrust enforcement. To introduce federal law or agency precedent dictating what level or quality of "review and approval" States must employ to achieve their regulatory goals grossly interferes with the States' rights to regulate private parties within those States. This case presents a question to the Court which impacts directly on these important State interests.

A decision to reverse the Third Circuit would jeopardize *amici* States' authority to effectively enact and implement regulatory schemes displacing competition and would subject those States' law-making authorities to the second-guessing of the Federal Trade Commission as to whether the State schemes provide for sufficiently "meaningful" review. If this Court were to adopt a particular federal standard for the "level or quality" of review by States' regulators, the following unintended results would occur:

- Private parties who engage in State-sanctioned anticompetitive acts pursuant to State laws and regulations will demand State regulatory agencies to review and approve their acts according to their understanding of the federal standard, placing an unwieldy burden on State regulators to meet the imagined level of review and approval;
- State regulators will be forced to adopt and engage in review and approval mechanisms to meet an ever-evolving *federal* "review and approval" standard, solely to satisfy the antitrust exemption for regulated parties, without regard to the *States'* regulatory framework or design;
- State regulators would be put under pressure to increase the number of agency orders placed on the regulated parties (evidencing the formal "review and approval"), but these orders would lead to *greater* restraints on trade and a more anticompetitive environment; and
- State legislatures will be placed under intense pressure to re-write existing, or adopt new, *state* laws to regulate commerce in such a way as to meet the ever-evolving *federal* "review and approval" standard, again, driven by pressure to permit more anticompetitive conduct instead of furthering the goals or policies of the State.

None of these results reflect a respect for the States' right to legislate and regulate as States see appropriate. If the Federal Trade Commission ("FTC") -proposed standard were adopted, States will be driven to adjust their laws and regulations to a *federal* standard based on *federal*



statutory law. States have an interest in furthering their own goals and policies, as long as they are not infirm as measured against the United States Constitution. Consequently, States should be free to adopt legislative and regulatory schemes that serve these goals, free of oversight by the FTC as to how the State schemes are fashioned or by what mechanisms they operate. Given our system of federalism, *amici* States have a profound interest in preserving and protecting their freedom to legislate and regulate their private parties by means they see fit to employ, without unnecessary or unreasonable constraints in federal statutory law.

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#### SUMMARY OF ARGUMENT

This is a case more about federalism than antitrust. It presents the Court with the question of what respect should be accorded by the federal government to the powers and prerogatives of States to adopt and administer regulatory programs designed to achieve State policies and goals independent of federal statutory policies and goals.

The issue before the Court concerns the proper role of the FTC in acting in those areas where the States have established regulatory mechanisms displacing competition and serving States' independent policies and goals. While the federal government and States share an interest in the vigorous enforcement of the statutory directives of federal antitrust law, States are free to regulate private parties in ways that further goals and policies independent of the goals of the Sherman Act. This is true even if

such regulation serves to immunize those parties from federal antitrust law under the "state action" doctrine; in fact, in such cases, antitrust enforcement effectively defeats state regulation. Under our system of federalism, the federal government ought to respect the powers and prerogative of States to legislate, regulate and sanction anticompetitive behavior, even if it appears unwise from the point of view of those charged with enforcing antitrust policy.

The Third Circuit Court of Appeals, recognizing the fundamental principles of federalism that underlie the state action doctrine, correctly decided this case under *existing* standards set forth by this Court to establish whether the state action doctrine provides immunity to the anticompetitive acts of entities actively regulated by the States. Under the final order of the FTC, however, the commission would have subjected the States to unwarranted scrutiny to determine on a case-by-case basis if the States' active regulation meets some imagined measure of zeal or effectiveness. Such federal intrusion into the sovereign affairs of the States would violate the principles of federalism and state sovereignty and inherently presumes a greater value in federal antitrust policy than in the States' individual policies underlying their regulation.

The purpose of the state action doctrine is to defer to the economic self-determination of the States where States meet objective standards signifying the displacement of competition with other independent, *state* interests. Such state economic regulation should be free of federal interference.

The narrow issue before the Court is whether the second prong of the test in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), requiring a State to "actively supervise" private State-sanctioned anticompetitive conduct further requires a particular heightened level of quality of review and approval by the State of the conduct. *Amici* States urging affirmance argue the active supervision prong is satisfied by the *fact* of supervision. In this case, the Third Circuit found that the relevant States, under state statutes that authorized the anticompetitive conduct in question, "had and exercised" the ultimate power to review and approve or disapprove that conduct, following standards set forth by this Court in *Midcal*, *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), and *Patrick v. Burget*, 486 U.S. 94 (1988). The review and approval in this case involved, as the Third Circuit found, checks to see if the rates submitted were within state guidelines, and rates were permitted to go into effect unless, as a result of state review, they were suspended or challenged.

The FTC, however, held such procedures were inadequate to establish that the states exercised their power to review and approve or disapprove. The FTC proposed and the Third Circuit rejected the notion that the state regulatory body must formally and affirmatively review and approve the rates in question. Such a rule wholly fails to respect the federalism basis for the state action immunity.

- Such a rule would substitute the FTC in place of the state regulators, permitting the federal commission to scrutinize and second-guess

each challenged act to determine whether the State conducted a sufficiently "meaningful" examination.

- The FTC test would force the state agencies essentially to follow federal administrative law to accomplish independent state goals.
- The FTC test of a formal, affirmative procedure is not necessary for the State to accomplish its goals and policies displacing competition where it deems appropriate. It is enough that the State has a means to supervise and engages in the fact of supervision; that guarantees that the private parties are fulfilling the goals of the State and not just their own.

This Court should give weight to the principles of federalism underlying the state action doctrine by rejecting the FTC approach and affirming the Third Circuit Court of Appeals opinion. Existing standards are adequate to determine whether States actively supervise the parties who engage in State-sanctioned anticompetitive conduct. Proposals to require States to adopt a new, federalized formal "affirmative review and approval" standard should be rejected as inconsistent with federalism and as not furthering the basic purposes of the state action doctrine.

**UNDER PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY, THE STATES' REGULATORY MECHANISMS SHOULD NOT BE SUBJECT TO FTC OVERSIGHT AS TO THE QUALITY OR LEVEL OF "ACTIVE SUPERVISION" REQUIRED TO MEET THE STATE ACTION DOCTRINE**

**1. Introduction**

This case presents an important question of federalism and of the proper role of the Federal Trade Commission in acting in those areas where the States have established regulatory mechanisms serving their independent policies and goals. While the federal government and States share an interest in the vigorous enforcement of the statutory directives of federal antitrust law, and while immunity from that law ought to be narrow, States also have the obligation to shield and protect their powers and prerogatives as sovereign entities under our federal system of government. The issues in this case lie at the cusp of that separation of powers vested in the States on one hand and the national government on the other. Consequently, this is less of a case concerning the reach of antitrust immunity to private parties and more one of respect for the powers and prerogatives of States to regulate commerce within their borders.

The Third Circuit Court of Appeals, recognizing these fundamental constitutional principles, correctly decided this case under *existing* standards set forth by this Court to establish whether the "state action" doctrine provides immunity to anticompetitive acts of entities actively regulated by the States. Under the final order of the FTC, the commission would have subjected the States

to unwarranted scrutiny to determine on a case-by-case basis if the States' active regulation meets some imagined measure of zeal or effectiveness. Such federal intrusion into the sovereign affairs of the States would violate the principles of federalism and state sovereignty and inherently presumes a greater value in federal antitrust policy than in the States' individual policies underlying their regulation. Commissioner Azcuenaga stated it most appropriately in her dissenting opinion in this case:

"It is not [the FTC's] role to question the correctness of a state agency's decision that proposed rates are reasonable or unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiters of state policy, a result that the principle of federalism underlying the state action doctrine precludes." (Separate statement of Commissioner Azcuenaga, concurring in part and dissenting in part, in *Ticor Title Insurance Co.*, [FTC] Docket No. 9190, p. 12.)

Reversing the order of the FTC, the Third Circuit Court of Appeals correctly applied existing Supreme Court standards to determine whether the state action doctrine applied. Having found the states in this case "had and exercised" the power to regulate the collective ratemaking for title search and examination services, the



circuit court correctly decided that the FTC erred in requiring more.

## 2. Principles Of Federalism Underlie The "State Action" Doctrine

In finding state action immune from federal antitrust law, this Court in *Parker v. Brown*, 317 U.S. 341 (1943), expressly rested its holding on the principles of federalism, where, under our "dual system of government [and] the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority . . ." (*Id.* at 351.) Any "unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (*Ibid.*) As the Court found in *Parker*, the Sherman Act gives no hint that it was intended to restrain state action. As to the proration marketing program in that case, the "State . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. [Citations.] (*Id.* at 352.) The prorationing "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." (*Id.* at 350.) Similarly, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105, where the Court found California did not actively supervise its wine pricing system, the Court re-emphasized the state action doctrine "is grounded in our federal structure . . ." (*id.* at 103), and articulated the two-pronged test whereby the state action doctrine protects *private* conduct that is (1) clearly

articulated as state policy and (2) actively supervised by the state. (*Id.* at 105.)

While some commentators have argued the Court ought to increasingly subject state regulatory policies to federal antitrust scrutiny because of concern that regulatory programs have been captured by special interests or because it is needed to ensure economic efficiency (see, e.g., Wiley, *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 719-23, 726-28 (1986)), they miss the fundamental purpose of the state action doctrine: *to defer to the economic self-determination of the States* where States meet objective standards signifying the displacement of competition with other independent, *state* interests. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985); *Midcal*, *supra*, 445 U.S. at 103-105; see also Garland, *Antitrust and State Action*, 96 Yale L.J. 486, 489-90, 499.<sup>1</sup> Thus *Parker* was not a case of judicial examination of economic regulation, but one of judicial respect for the political process and federalism. "The true 'essence' of federalism is that States *as States* have legitimate interests which the national government is bound to respect even though its

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<sup>1</sup> Mr. Garland responds to those who argue that the *Midcal* test unfortunately polices state delegations of authority rather than capture by noting that the Court never intended restrictions on delegation to serve the purpose of policing capture: "Instead, the restriction on delegation was intended to reconcile the Court's respect for the *political process in the states with its respect for the national political process*. When viewed in this light the *Midcal* test serves its purposes tolerably well, . . ." Garland, *supra*, 96 L.J. at 499 (emphasis added).

laws are supreme. [Citation.]” *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 (1985) (O’Connor, J., dissenting) (emphasis added). While *Garcia* concerned the reach of federal regulation under the Tenth Amendment, it highlights the question of whether certain state economic regulation is a traditional government function that should be free of federal interference. See Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 230, note 18.

**a. The *Midcal* Requirements As Deferential To The States**

*Amici* States urging affirmance believe *Midcal* test as interpreted by this Court in recent decisions is still an appropriate means of determining the breadth of immunity from federal antitrust law for private conduct that is articulated as state policy. This is because it properly defers to states’ own economic regulation, no matter how wise or unwise. As argued below, the Third Circuit properly employed the test in this case.

In the first prong of *Midcal*, the private conduct must be “ ‘one clearly articulated and affirmatively expressed as state policy’ ” *Midcal*, *supra*, at 105. “Moreover, a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be ‘clearly articulated’ within the meaning of *Midcal*. [Fn. omitted.]” *Southern Motor Carriers Rate Conference v. United States*, *supra*, 471 U.S. at 61-62, & fn. 23 (emphasis in original). In *Southern Motor Carriers*, the Court examined whether statutes of four states shielded common carrier rate bureaus’ collective

rate-making from antitrust enforcement and found that the legislatures of North Carolina, Georgia and Tennessee expressly permitted motor common carriers to submit collective rate proposals to public service commissions, which had the authority to accept, reject or modify any recommendations. The Mississippi statute, which provided that its common carrier commission would prescribe “just and reasonable” rates for intrastate transportation of commodities, but made no mention of collective rate-making, also met the first *Midcal* prong. *Southern Motor Carriers*, *supra*, 471 U.S. at 63-4.

However, in discussing Mississippi, this Court declined to scrutinize the “details of the inherently anti-competitive rate-setting process” in Mississippi. *Southern Motor Carriers*, at 64. The Court held a private party acting pursuant to an anticompetitive regulatory program “need not ‘point to a specific detailed legislative authorization’ for its challenged conduct. [Citation.] As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.” *Southern Motor Carriers*, at 64. Where a statute clearly contemplates that the parties may engage in anticompetitive conduct or where anticompetitive effects would logically result from the authority to regulate, there is present an adequately articulated policy displacing competition. *Town of Hallie v. City of Eau Claire*, *supra*, 471 U.S. at 42; *City of Columbia et al. v. Omni Outdoor Advertising, Inc.*, 499 U.S. \_\_\_, \_\_\_, 113 L.Ed.2d 382, 393, 111 S.Ct. \_\_\_, \_\_\_ (1991). This Court has not required and need not require any greater specificity in the “clearly articulated policy” prong than already provided in *Southern Motor Carriers* and *Town of Hallie*.



The existing standard respects the particularities and unique attributes of state law-making and serves to curtail any tendency by federal courts to read state laws for their intent. Federal courts should look only to the broad objective standard to find the displacing policy. See Jorde, *supra*, 75 Calif. L. Rev. at 247-48. As then-Judge Kennedy stated in *Llewellyn v. Crothers*, 765 F.2d 769 (1985): "The availability of *Parker* immunity . . . does not depend on the subjective motivations of individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty." *Llewellyn, supra*, at 774; see also Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 439 (1981).

**b. The "Active Supervision" Test Is Satisfied By The Fact Of Supervision**

The second *Midcal* prong necessary to immunize private conduct, that of active supervision by the state, was not the subject of *Southern Motor Carriers*. Yet that case is instructive with respect to this prong, as, in that case, as here, collective rate proposals were submitted to state regulatory agencies and became effective if the agency failed to act within a specified time. Nonetheless, in *Southern Motor Carriers*, this Court found the state public service commissions had and exercised *ultimate* authority and control over all intrastate rates.<sup>2</sup> *Southern Motor*

<sup>2</sup> This Court noted the Government conceded the relevant states, through their agencies, actively supervised the conduct of the private parties. *Southern Motors*, 471 U.S. at 66.

*Carriers*, 471 U.S. at 51; see Jorde, *supra*, 75 Calif. L. Rev. at 250.

In its most recent "active supervision" case, this Court again reiterated the "have and exercise authority" language of *Southern Motor Carriers*. *Patrick v. Burget, supra*, 486 U.S. 94. There, a hospital review committee terminated staff privileges of a hospital physician. The statute at issue provided for a peer review mechanism, but, as the Court held, Oregon law did not give the Health Division authority to review or overturn decisions that fail to accord with state policy, and thus, the state did not have and exercise ultimate authority over the private privilege determinations. *Patrick, supra*, 486 U.S. at 102-03. More to the point, Oregon did not "have" ultimate authority over the actions, irrespective of whether it "exercised" authority. Not having the authority, it certainly did not exercise it. The holding in *Patrick* was based entirely on the *failure of the state statutory scheme* to give the authority to the state Health Division to oversee the peer review committees. Nowhere did the Court scrutinize the *manner* in which state regulators would carry out this task; not having been so empowered, the question did not arise. As discussed below, *Patrick* is not apposite here, as these states had statutory schemes that empowered their insurance departments to review and approve or disapprove of submitted proposed rates. At issue here is whether the FTC should scrutinize the *quality* or *manner* of the "exercise" of authority given the states' departments when reviewing, approving or disapproving the rate filings.

In numerous opinions of the federal courts, it has been held that the focus of the active supervision prong



should be on the procedures by which the state controls the challenged collective rate-setting (see *Capital Telephone Company v. New York Telephone Company*, 750 F.2d 1154, 1163-1164, 1165 (2d Cir. 1984), *cert. den.*, 471 U.S. 1101 (1985); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 389-390 (7th Cir. 1984), *cert. den.*, 472 U.S. 1027 (1985); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982), *cert. den.*, 456 U.S. 1011 (1982); see also *Capital Telephone Company v. Schenectady*, 560 F.Supp. 207, 210-211 (N.D.N.Y. 1983)), not on the behavior or effectiveness of the state employees in carrying out the procedures.<sup>3</sup> It is the *fact* of supervision, not the *substance* of it which is the crux of immunity under *Midcal*. While requiring that states meet certain objective standards signifying the displacement of competition with other independent state interests, the *Midcal* test is appropriately deferential to the states as to how they, in their sovereign decision-making capacity, go about the business of regulating commerce within their borders.

<sup>3</sup> In objectively evaluating the procedures in *Midcal*, the court noted the state had not (1) established prices; (2) reviewed the reasonableness of the price schedules; (3) did not monitor market conditions; nor (4) engage in any pointed reexamination of the program. *Midcal*, 445 U.S. at 105-06. These are objective factors which show whether the state exercises authority given it to regulate the anticompetitive conduct. See *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1073 (1st Cir. 1990) (using two of the four factors to show Massachusetts "exercised" its power; noting also that the presence of all the factors is not required for such a showing).

## II

### THE THIRD CIRCUIT DID NOT ESTABLISH A NEW STANDARD FOR "ACTIVE SUPERVISION;" RATHER, THE FTC DEvised A NEW STANDARD REQUIRING IT EXAMINE THE "STRICTNESS" OR "MEANINGFULNESS" OF A STATE'S REGULATION

#### 1. Introduction

The Third Circuit correctly ruled here that the FTC erred in insisting on a particular measure of strictness or effectiveness in which the state must pursue its regulatory program in order for the "active supervision" prong to be met. *Ticor Title Insurance Company v. FTC*, 922 F.2d 1122 (3rd Cir. 1991). Quoting *New England Motor Rate Bureau, Inc. v. FTC*, *supra*, 908 F.2d at 1076, the Third Circuit noted:

"Where as here the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine or preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs." *Ticor Title, supra*, 922 F.2d at 1136, quoting *New England Motor Rate Bureau, Inc., supra*, 908 F.2d at 1071.

The above does not represent a new standard for determining when the "active supervision" prong is met.

To the contrary, it is a proper reading of *Midcal*, *Southern Motor Carriers*, and *Patrick*. As both Circuits came to grips with the factual settings before them, they followed *Patrick's* restatement of the active supervision prong to ask if the agencies "had" power to review and disapprove particular anticompetitive conduct and whether they "exercised" that power. The Commission has argued in this case that a "basic level of activity" to carry out the state's policy is an inadequate test and represents a new, more lenient standard for finding a state has "exercised" its authority. FTC Pet. at 8, 14. The Commission errs in treating the "basic level" language as a new test: it is simply indicia to gauge whether the regulatory program effectively guarantees that the "private actors carry out the state's policy and not simply their own policy;" in short, *evidence* of the state's exercise of its authority. Where such a basic level can be shown, the *fact* of active supervision is established, and the FTC should go no further to examine the quality, intensity or zeal with which the State regulates its industries.

Here, the FTC erred in insisting upon a new standard, uncalled for by *Midcal*, 324 *Liquor Corp.*, or *Patrick*, of its own making, where active supervision can only be met by "meaningful" regulation. Nowhere has this Court set forth that the state action doctrine may be met only where states "meaningfully" regulate their industries. Such a standard invites the kind of arbitrary oversight as occurred in this case, when one commissioner found agency commissions "excessively high" or opined that a state regulator's resume demonstrated he was unqualified to do the state's work. *Ticor Title*, *supra*, 922 F.2d at

1138, 1140. Indeed, the FTC standard may have the paradoxical anticompetitive effect of encouraging more state regulation by forcing state regulators to require anticompetitive results through orders or decrees. Instead, once the objective standards for active supervision are met, the FTC should have no jurisdiction to evaluate the wisdom of states' anticompetitive policies or the effectiveness of their regulation. *New England Motor Rate Bureau, Inc.*, *supra*, 908 F.2d at 1072.

## 2. The Third Circuit Correctly Found The States "Exercised" Authority They "Had"

Petitioner attempts to reargue the facts, already examined and applied by the Third Circuit Court of Appeals. FTC Pet. at 15-18. Petitioner wants a new *qualitative* assessment of the regulators' actions in order to show there was insufficient exercise of the states' authority to regulate the rate-setting for title insurance search and examination services. In each case, however, the facts support the finding of the Third Circuit that the States "had" and "exercised" the requisite authority.

### a. Wisconsin and Montana

There should be no question but that Wisconsin and Montana displaced competition with regulation for the title search and examination rate-filings. State law permitted the making of rates collectively, to be submitted by the rating bureau to the Insurance Departments. Wisc. Stat. § 625.13; Mont. Code Ann. §§ 33-25-212, 33-16-203. Illustrative of the authority vested by the state law in

rating bureaus is the exact language of Wisconsin Statute section 625.02:

" . . . (2) 'Rate service organization' means any person, other than an employee of an insurer, who assists insurers in rate making or filing by:

" . . . .

"(b) *Recommending, making or filing rates or supplementary rate information; . . .* "

In these states, rates were not to be excessive, inadequate or unfairly discriminatory. Wisc. Stat. § 625.11; Mont. Code Ann. §§ 33-16-201, 33-16-311. Even where the State encouraged these rates to be formulated on the basis of competitive market conditions, there is no question but that the state policy set forth in the statutes had a foreseeable effect of ultimately displacing competition with the regulated, collectively-set rates. Avoidance of excessive or non-discriminatory rates is an expressly-stated state policy; it effectively substitutes for free competition in the market. No matter *how* the rates are formulated, e.g., based on competitive market conditions or otherwise, once they are submitted for review for consistency with the expressed state policies, they are subject to the first prong of *Midcal*, namely, they are pursuant to a clearly articulated policy of the State.<sup>4</sup>

Next, the circuit court was correct in finding Wisconsin "had" the authority to supervise the collective rate-

<sup>4</sup> As noted by the Third Circuit, complaint counsel stipulated that the four states at issue clearly articulated the anti-competitive policies at issue here. 922 F.2d at 1140.

setting. The insurance departments were charged with ensuring that filings conform with the not excessive, non-discriminatory policies, cited above. Wisc. Stat. 625.11; Mont. Code Ann. §§ 33-16-201, 33-16-311. The departments were authorized to develop statistical plans for the reporting of loss and expense experience and to inquire of the rating bureaus' data on revenues and costs to help the regulator review the proposed rates. Wisc. Stat. § 625.34; Mont. Code Ann. § 33-16-202. Procedures for the filing of rates and justifications by bureaus were established by law. Wisc. Stat. § 625.13; Mont. Code Ann. §§ 33-25-212, 33-16-203. The departments were authorized to approve or disapprove rate filings and were required to rescind any filings if they did not meet statutory criteria. Wisc. Stat. § 625.22, Mont. Code Ann. §§ 33-16-204 through 33-16-211.

Further, Wisconsin "exercised" this authority in relation to the three filings at issue, in 1971, 1981 and 1982. The administrative law judge found the insurance commissioner approved the submitted 1971 rates. This occurred after department officials met with bureau members, indicated they would review the filings and later indicated the filing was "acceptable," implying a review took place. Tr. 1619-1625. As the Third Circuit found, the department's program to review these rate filings was staffed and funded. *Ticor Title, supra*, 922 F.2d at 1140. The record also discloses the 1981 filing was reviewed, not merely for statistical accuracy, but also against financial and statistical information collected from title insurance companies, and that, upon review, the filing was "substantial." Tr. 1824. Similarly, the testimony of the department analyst showed the 1982 filing



was reviewed and approved. Tr. 1957. Further, mandamus was available to compel the public officers to perform any duties outlined in the statute, *Ticor Title, supra*, 922 F.2d at 1140; such duties are not a matter of the exercise of an officer's discretion. If these facts are to be taken as true, then surely these states "exercised" their authority to review the rates submitted to them and it is implicit therein that the review was of the reasonableness of the rates as they related to the state policies against non-excessive, non-discriminatory rates. Thus, there was evidence of the reasonableness review under *Midcal* to show the state "had" and "exercised" its authority. The fact of this supervision having been demonstrated, the FTC could not insist on more. Based on the foregoing, the Third Circuit opinion should be affirmed as to Wisconsin and Montana.

#### b. Arizona And Connecticut

As the FTC's own petition acknowledges, there was evidence before the commission to show the Arizona and Connecticut insurance departments reviewed rate-filings to see if they conformed with state policies and then approved or disapproved. FTC Pet. at 19. The Commission simply argues it was inappropriate for the appeals court to not defer to the fact-finding of the Commission in this regard. In fact, the Circuit Court of Appeals did not reweigh the facts, but properly applied facts to the law. In the Connecticut and Arizona cases, the facts speak clearly of active supervision. Commissioner Azcuenaga dissented from the majority on these cases, and her dissent, attached hereto as an appendix, is an eloquent statement of the appropriate role of the Commission in state

action doctrine cases and the importance of federalism to the analysis of the Commission and the courts. In her conclusion, Commissioner Azcuenaga states:

"The majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies. The failure to carry out any statutory requirement, whether that requirement has anything to do with a review of proposed rates for consistency with state policy or not, is taken as proof that active supervision of rates did not take place. On the other hand, the failure to take action to limit commissions paid to attorneys demonstrates a lack of supervision even where such action is not authorized by the agency's enabling statute; the agency must review each and every 'critical component' of a proposed rate even if the state legislature intended only that it review the reasonableness of the rate itself. This comes perilously close to a 'heads we win, tails you lose' standard." (Separate statement of Commissioner Azcuenaga, concurring in part and dissenting in part, in *Ticor Title Insurance Co.*, [FTC] Docket No. 9190, p. 11.)

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#### CONCLUSION

This case does *not* present this Court with a new, more lenient standard for "active supervision" set forth by the First and Third Circuit Courts of Appeals. However, the FTC *does* seek to have this Court adopt a new and inappropriate standard for "meaningful" "active

supervision" employed by the Federal Trade Commission. The Third Circuit in *New England Motor Rate Bureau, Inc.*, *supra*, 908 F.2d 1064, followed existing standards set forth in *Midcal*, 324 *Liquor Corp.*, and *Patrick*, finding the states at issue "had" and "exercised" the requisite authority to see that the state policies, however anticompetitive, were carried out. They did so based on objective criteria that, once established, demonstrated the *fact* of supervision. The FTC, on the other hand, would continue the inquiry far beyond the fact of supervision to exact a "meaningful" and "effectiveness" review of the state's regulatory supervision. This new standard simply does not comport with the federalism principles underlying the state action doctrine and fails to defer in the slightest to the states' sovereign decision-making and economic self-regulation. It puts the FTC in the position of trying the state regulator. In the view of amici states urging affirmance, it "goes too far." *New England Motor Rate Bureau, Inc.*, *supra*, 908 F.2d at 1075. Accordingly, this Court should affirm the opinion of the Third Circuit Court of Appeals.

DATED: December 23, 1991

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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FEDERAL TRADE COMMISSION,

v.

*Petitioner,*TICOR TITLE INSURANCE COMPANY, *et al.*,*Respondents.*

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**BRIEF *AMICUS CURIAE* OF THE  
NATIONAL COUNCIL ON COMPENSATION  
INSURANCE IN SUPPORT OF RESPONDENTS**

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**BRIEF AMICUS CURIAE OF THE  
NATIONAL COUNCIL ON COMPENSATION  
INSURANCE IN SUPPORT OF RESPONDENTS**

The National Council on Compensation Insurance ("NCCI") submits this Brief Amicus Curiae to respectfully request the affirmance of the decision of the United States Court of Appeals for the Third Circuit.

**INTEREST OF AMICUS**

NCCI is a not-for-profit organization that provides a wide variety of services to the workers' compensation insurance industry. Its membership includes approximately 750 insurance carriers and competitive state insurance funds<sup>1</sup>

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<sup>1</sup> A competitive state insurance fund is a statutory entity that functions in the market like a private carrier and may compete with private carriers. In some states the fund is required to provide insurance to bad risks that cannot obtain coverage from a private carrier. See 3 *Larson's Workmen's Compensation* § 92.50 (desk ed. 1991).



that together provide workers' compensation and employers' liability insurance coverages to employers in forty-four<sup>2</sup> states and the District of Columbia. In thirty-two of these states, NCCI is a licensed rating bureau or advisory organization for workers' compensation and employers' liability insurance. In most of the remaining states, NCCI plays some role in workers' compensation insurance ratemaking and rulemaking.

As a rating organization, NCCI collects and reports data, develops systems for the uniform classification of risks by employment category, designs policy forms and endorsements, and purposes rates and rating plans. *See Larson's Workmen's Compensation*, *supra* note 1 at § 92.60. NCCI's activities in these matters are authorized by state law and regulated by state insurance authorities.

Workers' compensation insurance is mandatory for employers in virtually every state. *Id.* at § 92.11. Some employers that must purchase this coverage are not, however, individually insurable. Smaller and newer companies and those with poor safety records may be considered unacceptable risks by a carrier. In order to accommodate the insurance needs of these employers, certain states with the cooperation of their workers' compensation insurers have established mechanisms that assure workers' compensation insurance to all employers within the state. This separate mechanism for workers' compensation insurance is open to all employers that have been refused coverage by carriers on an individual basis, and is called the "residual" or "involuntary" market. NCCI manages the residual market mechanism in thirty-one states and in the District of Columbia. NCCI is also responsible for the development and filing of rates and rules for the

<sup>2</sup> Six states generally do not allow a workers' compensation insurance market. These states have created a monopolistic state fund to provide coverage to employers that cannot qualify to self-insure their workers' compensation liabilities. NCCI is a qualified advisory organization in all six states.

residual market mechanism. These rates and rules guarantee the availability of workers' compensation insurance policies for higher risk employers.

NCCI is not authorized to mandate rates or rules. These rates and rules must be developed in conformity with and be responsive to applicable state workers' compensation and insurance laws and they must be submitted for substantive review to the insurance regulator in each state. They are then approved or disapproved in accordance with the insurance laws of the state.

The filing of rates, classification systems, rules and policy forms is universally required by statute or regulation. The insurance regulator is required to review all filings to ensure their conformity with a statutory standard — usually a "just and reasonable" test or a "not excessive, inadequate or unfairly discriminatory" test. The statutory tests have various objectives — insurer solvency, equal treatment of similarly situated consumers, and fair pricing of the insurance product. In regulating workers' compensation insurance, it is also vitally important for the regulator to ensure that the market, and the residual market mechanism, remain intact and can respond to the requirement that complete and affordable coverage is universally available. There is no state in which the insurance regulator lacks the power to approve or disapprove or thoroughly investigate any filing in keeping with these objectives.

Nevertheless, the regulatory environment and the rules that govern it vary among the states.<sup>3</sup> All state laws facially require a substantive review but for a host of reasons, a regulator may be more or less inclined to fully employ the statutory arsenal of options that are available in response to a particular filing. Effective resource allocation, historical factors and experience, public controversy, known problems in the market and the importance of the filing to the insurance consumer may affect the regulator's discretion in any given case. The regulators are neither bashful nor disinterested, and they clearly have and exercise the flexibility to experiment with the regulatory options available in the pursuit of acceptable results. Sometimes, perhaps often, they opt for minimal supervision, especially where many years of experience teaches that more is not required. When that option is selected, it is invariably the regulator's choice.

In the instant case, the court below declined the Federal Trade Commission's ("FTC") invitation to test the quantity, quality, and effectiveness of the regulators' choices. It is not claimed by the FTC that the choices were not made or that they were not the regulators' choices, only that they were not

<sup>3</sup> The common rule contemplates a public filing followed by a waiting period, at the end of which the filing is deemed approved, unless the regulator has issued a notice of disapproval or ordered a hearing. See e.g., Colo. Rev. Stat. § 10-4-406 (1987 and Supp. 1991); Conn. Gen. Stat. Ann. § 38a-676(b) (West Supp. 1991); Haw. Rev. Stat. § 431:14-104 (Supp. 1990); Iowa Code Ann. § 515A.4 (West 1988); La. Rev. Stat. Ann. §§ 22:1407(D), 1408 (West 1978 and Supp. 1991); S.D. Codified Laws Ann. §§ 58-24-17-19 (1990). In these states and in those with similar laws, the regulators typically may order a hearing as a matter of discretion. A smaller number of states require the regulator to affirmatively approve or disapprove a filing before it may become effective. See e.g., Ala. Code § 27-13-68 (1986); Fla. Stat. Ann. §§ 627.101, 141, 151 (West 1984); Tenn. Code Ann. § 56-5-306 (1989); Utah Code Ann. § 31A-19-406 (1991); Va. Code Ann. § 38.2-2006 (1990). There are several other variations on these themes. Only Maine requires a hearing on a rate filing whether or not it is requested. Me. Rev. Stat. Ann. tit. 24-A, § 2319 (1990 & Supp. 1991).

good enough to earn the respect that must be accorded to the acts of states as sovereigns in an antitrust context. In seeking reversal of the decision below, the FTC asks this Court to adopt a standard requiring the regulator to evidence his or her choice by some form of "affirmative determination" showing that the private collective conduct has been proven to be consistent with state policy.

It is not clear precisely what level of inquiry the FTC would consider adequate, but it is clear to NCCI that the test proposed would destabilize, by exposing to antitrust disruption, the longstanding and generally well supervised system for insuring workers' compensation benefits in most states. NCCI submits this brief amicus curiae to emphasize that the matters directly presented to the Court in this case are small parts of a vastly larger picture. The larger picture can be caused to disassemble if this Court concludes that those states which have chosen to authorize collective insurance ratemaking, have failed to protect this process where the statutory regulator is permitted to expeditiously review non-controversial filings that are, in the regulator's unspoken judgment, consistent with the state's regulatory policies.

NCCI's interest in this case is apparent. NCCI urges the Court to consider the impact the FTC's test would surely have on the workers' compensation insurance industry and state workers' compensation systems as well.

## SUMMARY OF ARGUMENT

NCCI, on behalf of its members, urges affirmance of the decision below. NCCI's collective rate and rulemaking functions are authorized by state insurance laws. These activities are regulated by the same insurance authorities that regulate title insurance, and the relevant state laws that establish the regulatory regimes are the same or similar as well. Yet, the case presented to the Court is anecdotal. NCCI urges the



Court to consider this case in light of its potential impact on the workers' compensation insurance industry.

The workers' compensation program and the insurance regulatory program in a state are linked. In order to provide fully adequate workers' compensation insurance coverage, rating organizations like NCCI must be prepared to respond quickly and efficiently to legislative amendments and external factors that directly affect the affordability of workers' compensation insurance and insurer solvency. State insurance regulators must also have the flexibility and authority to facilitate the state's workers' compensation objectives in light of the state's insurance regulatory policies. It is sometimes, perhaps often, the case that this can and should be accomplished without intensive investigation. When the regulator chooses this course, the choice is informed and it is made by the regulator as an officer of the state.

The FTC asks this Court to redefine the regulator's job and dictate the performance standards that must be met to prevent nullification by the federal antitrust laws of the regulatory choices made. The FTC's request is not in accord with this Court's jurisprudence mandating respect for state sovereignty.

This is a critical matter for NCCI, workers' compensation insurers and state workers' compensation systems. Where NCCI is required by state law to develop and propose rates and rules, it must do so with the understanding that the regulators that protect this collective activity from antitrust liability, will not later be tried under the federal antitrust laws to determine whether they did their jobs effectively. The FTC proposes an "active supervision" test that virtually assures repeated and constant trials of state insurance regulators under a subjective standard that will surely produce unpredictable consequences.

This prospect, in turn, and the uncertainty it will cause must call into question the ability of the workers' compensation insurance industry to provide this line of insurance for employers and workers in many states. The solvency of workers' compensation insurance programs is entrusted by state law to state insurance regulators. The objectives of the federal antitrust laws are not achieved by shifting this critical responsibility to federal judges and juries. To do so not only diminishes state sovereignty, but it jeopardizes a critical social insurance program as well.

## ARGUMENT

### A. An "Affirmative Determination" Test Would Disrupt State Workers' Compensation Systems

A workers' compensation program is typically the largest social insurance program administered by any state.<sup>4</sup> It is an important matter in every state, affecting every employer and in the aggregate millions of workers and their families. State legislators pay considerable attention to their state's workers' compensation laws. In each year, over the last decade, the states collectively have considered from 500 to 1,000 amendments to their workers' compensation laws. Many are enacted. It is common for states to regularly increase benefits, expand coverage, revise filing limitations, enlarge the scope of

<sup>4</sup> The federal government administers three workers' compensation programs, the Longshore Act and its extensions, 33 U.S.C. §§ 901-950, the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, and the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8151. The latter is self-insured by the United States. Commercial insurance rates for federal black lung and longshore coverages are established by state regulators.



medical and rehabilitation benefits and the like.<sup>5</sup> It is also not unusual for states to redesign portions of their workers' compensation laws to address the concerns of certain industries, to attract new business to the state, to respond to the demands of worker representatives or to pursue workplace safety and health objectives.

Amendments that are enacted often have a direct and significant impact on costs. They may also affect underwriting rules, policy forms and classification and rating systems, all of which play a role in the pricing of the workers' compensation insurance product. At the same time, workers' compensation insurance policies must respond to all of an employer's statutory liabilities without dollar limitation. Workers' compensation is the only major line of insurance in which losses attributable to a policy cannot be limited to a set dollar amount. Neither does the workers' compensation insurer have the option to exclude from coverage offered any type of risk or loss that is included by the state's workers' compensation law.

Within this complex political and legal environment, it is the job of the licensed workers' compensation insurance rating organization and the insurance regulator to respond to rapid, constant and often dramatic changes. These responses must be expeditious, targeted to the need, and maximally effective. Whatever the response, it must be submitted to the insurance regulator for approval for it to become viable. In most states, the applicable insurance law recognizes a degree

<sup>5</sup> This term, the Court is considering a case that graphically illustrates the sometimes frantic legislative activity that is common in the workers' compensation arena. *General Motors Corp. v. Romein*, cert. granted, 111 S. Ct. 2008 (1991).

of urgency in these matters.<sup>6</sup> The law of the state relies on the regulator to carry out the duty to decide which filings require a high degree of regulatory scrutiny and which do not. The regulator's choice is informed by many factors including historical antecedents, experience, and public interest.

For workers' compensation insurance, this system of regulating has functioned reasonably well for decades. It guarantees intensive regulation when warranted, *e.g.*, where a significant rate increase is proposed. It also guarantees that lesser matters, *e.g.*, the modification of a classification or rating schedule, or a new policy form needed in response to changes in state law, are expeditiously and efficiently processed.

For workers' compensation insurers, their rating bureaus, the states, employers and employees, the FTC's proposed affirmative determination standard poses the threat of enormous disruptions in the funding of benefits for workers and their families.

#### **B. The Workers' Compensation Insurance Industry Needs a Bright Line Active Supervision Test to Ensure Its Ability to Provide Its Insurance Product**

The jurisprudence relevant to this case is fairly clear, even if no specific holding dictates an inexorable result. Principles of federalism limit the reach of the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). Private anticompetitive behavior that might otherwise be condemned is permitted, in light of these principles, where a state has chosen to displace competition in the market with regulation. A two

<sup>6</sup> Of thirty-four states' laws that employ a "deemed approved" procedure, twenty-five states provide for a waiting period of thirty days or less. Typically, the filing is available for public inspection during the waiting period and in some states the regulator is authorized to re-open the matter after expiration of the waiting period even if the filing has become effective and is in use. See *e.g.*, Kan. Stat. Ann. § 40-1113(f) (Supp. 1990); Wash. Rev. Code Ann. §§ 48.18.120, 48.19.450 (1991).

part test determines whether enough state sovereignty is exerted to warrant antitrust immunity for state sanctioned collective private conduct. First, the state must clearly articulate and affirmatively express its policy to restrict competition, and second, the state must actively supervise compliance with the policy articulated. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The instant case addresses the "active supervision" part of the test. This Court held that when the state clearly articulates its policy and then walks away allowing the private parties to essentially self-regulate, that test is not met. *Id.*; *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 (1987). "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anti-competitive acts of private parties and disapprove those that fail to accord with state policies." *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

The instant case, and indeed the bigger picture of insurance regulation by the states, does not present a setting in which the states merely stated their policy and left the private actors to make the best of it in their own interest. The states were on the scene in the person of their insurance regulators and the regulators were empowered. On the same day that a regulator may have decided to allow a title search and examination rate to go into effect without expressing an affirmative opinion, the regulator may have also held a public hearing on a proposed workers' compensation rate increase — or the reverse might be true in any year or in any state. The power to exercise this kind of judgment and make regulatory choices is a central component of state sovereignty. This Court's jurisprudence suggests that the regulator's choices or value judgments are best left to the official charged with making those

judgments and not federal judges or juries. See *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349, 1352 (1991).

The FTC's proposed affirmative determination corollary to the active supervision principle is an open ended invitation to micromanage state insurance regulators in the pursuit of antitrust enforcement. The difficulties suggested by this standard are apparent. It would result in an uncertain process. Rating bureaus, like NCCI, and insurers could never be sure that state regulators had acted with sufficient assertiveness to legitimize an otherwise approved filing, or whether the process itself exposed the insurers to massive antitrust litigation and potential treble damages as a result of the conduct of state employees over whom the insurers have no control.

For the FTC, it would not be enough for the regulator to simply but affirmatively state that a filing was approved. If the regulator were obliged to require the filing of extensive economic analysis would it then be necessary for the regulator to affirm that it was read — and understood? Must a regulator file a reasoned opinion or order explaining in some detail why a filing was approved or denied, and how in particular it does or does not comply with state policy? Must there be a hearing or some kind of proceeding? These inquiries cross the line drawn by the state action doctrine.

The workers' compensation insurance industry submits many filings with insurance regulators in many states throughout a year. These filings, in one way or another, invariably affect the price and the scope of the workers' compensation insurance product being sold. The industry relies on its regulators to carry out their statutory responsibilities and anticipates that they will do so. By the same token, it is critically important in every state permitting private insurance for workers' compensation, that affordable and complete insurance coverage be readily available whatever external or legislative changes are brought to bear on a state's workers' compensation program. To meet state policy objectives on

the insurance side and on the workers' compensation side, insurance regulators and state legislators have evolved regulatory patterns that are efficient and that work to these ends.

This case presents anecdotal regulatory events in several states. In each instance, the regulators carried out their duties under state law in a manner they deemed appropriate to the situation. The FTC's subjective, impressionistic standard seeks to deprive these regulators of the power to select the regulatory approaches they believe are most consistent with state policies. The standard greatly overreaches its anecdotal targets and favors a degree of disruption in historically long-standing regulatory behavior that is not warranted.

NCCI believes that the Third Circuit correctly decided this case. In reliance on this Court's jurisprudence, the court of appeals settled upon a bright line approach ensuring that the value judgments and regulatory options entrusted to fully empowered regulators will remain where the states and the antitrust laws intended.

## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL., RESPONDENTS

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF FOR HARTFORD FIRE INSURANCE CO., ET AL.,  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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## QUESTION PRESENTED

The amici curiae will address the following question:

Whether collective ratemaking concededly authorized by state law was "actively supervised" by state officials, and therefore immune from antitrust scrutiny under *Parker v. Brown*, 317 U.S. 341 (1943), where the rates were subject to review by state regulators who had the power and the duty to overturn rates that were inconsistent with the public interest.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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No. 91-72

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FEDERAL TRADE COMMISSION, PETITIONER

*v.*

TICOR TITLE INSURANCE CO., ET AL., RESPONDENTS

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**On Writ of Certiorari to the  
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**BRIEF FOR HARTFORD FIRE INSURANCE CO., ET AL.,  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE AMICI CURIAE**

The amici are (1) four primary insurance companies: Aetna Casualty and Surety Co.; Allstate Insurance Co.; CIGNA Corp.; and Hartford Fire Insurance Co.; (2) Insurance Services Office, Inc., a licensed property-casualty rating and advisory organization consisting of 1400 insurance companies participating in the United States; (3) five domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; and Prudential Reinsurance Company; (4) the Reinsurance Association of America, an association of domestic reinsurers; and (5) Thomas A. Greene & Co., a domestic reinsurance broker. Amici all are defendants in *In re*

*Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). They have a vital interest in the outcome of this case for two principal reasons.

First, amici are subject to state insurance regulatory systems that resemble those at issue here. Amici thus could be affected directly by a decision holding that, despite the existence of a clearly articulated state policy to displace competition with regulation in the insurance field, insurance companies may be sued under the anti-trust laws if state regulators do not look closely enough at the rates filed with them.

Second, amici are already under attack by the attorneys general of several States for engaging in statutorily authorized collective activity to develop forms for commercial general liability insurance. See *In re Insurance Antitrust Litigation*, *supra*. In that litigation, the district court upheld amici's state action and McCarran-Ferguson Act defenses. On the state action issue, the Ninth Circuit reversed on the theory that state regulators, although approving jointly developed insurance forms, had not reviewed an alleged boycott in the forms development process. Various state attorneys general who are plaintiffs in *Insurance Antitrust Litigation* have joined an amicus brief in this Court in support of the FTC's position in this case, specifically arguing (Am. Br. 21) that the Court should rely on the Ninth Circuit's decision.

In fact, that decision is not relevant here because it turned on a legal issue wholly distinct from the questions presented by the FTC in this case. As the attorneys general themselves acknowledged in their response to the rehearing petitions filed before the Ninth Circuit in *Insurance Antitrust Litigation* (at 9), "[p]laintiffs have never claimed \* \* \* that state officials were negligent in their duties of review and supervision." The record in *Insurance Antitrust Litigation* leaves no doubt that the proposed insurance forms were the subject of continuous

discussions with state regulators from 1984 through 1986 and were addressed both at public hearings and forums before insurance regulators in 35 States and at meetings of the National Association of Insurance Commissioners.

The Ninth Circuit in *Insurance Antitrust Litigation* instead accepted the argument advanced by the attorneys general that "the offending conduct, boycotts, was never submitted to [state regulators] for review and supervision" (Response to Reh. Pet. at 9). The court of appeals, observing that "state approval of one activity is not state approval of a related but distinct activity" (938 F.2d at 931), believed that the States' authorization and approval of the collective development of insurance policy forms did not approve the alleged "boycotts used to produce agreement on the forms." *Ibid*.

Amici will soon file a petition for a writ of certiorari asking this Court to review the Ninth Circuit's decision, which has far-reaching implications not only for interpretation of the state action doctrine but also for interpretation of the McCarran-Ferguson Act.<sup>1</sup> Amici thus have an

<sup>1</sup> In defining the state action issue presented here, it should be emphasized that this Court, the lower courts, and the Solicitor General all have agreed that the distinct McCarran-Ferguson immunity for the business of insurance does not turn on a federal court's assessment of the adequacy or effectiveness of the state regulation. See, e.g., *FTC v. National Casualty Co.*, 357 U.S. 560, 564 (1958); *Ohio AFL-CIO v. Insurance Rating Board*, 451 F.2d 1178, 1184 (6th Cir. 1971), cert. denied, 409 U.S. 917 (1972); Brief for the United States as Amicus Curiae at 26-27 n.15, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (No. 77-952) ("state regulation of the business [of insurance] need not be affirmative or effective to supplant the antitrust laws [under the McCarran Act]"). As the Solicitor General has acknowledged,

The requirement that a state must regulate the particular conduct at issue in order to bring it within the [McCarran Act] exemption does not require the courts to determine whether the state's regulatory power is effectively exercised. \* \* \* [T]his Court reject[ed] \* \* \* the argument in *FTC v. National Cas-*



interest in ensuring that the Court in this case does not prematurely address what, as we demonstrate below, is the quite distinct state action issue presented in *Insurance Antitrust Litigation*.

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. This Court determined in its landmark decision in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend to preempt state authority to engage in economic regulation when it enacted the Sherman Act. Relying on "principles of federalism and state sovereignty," the Court held that the States retained the power to impose regulatory regimes based on conceptions of the public interest different from the free competition mandate of the antitrust laws. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349 (1991). In recent years, the Court repeatedly has shaped *Parker's* state action doctrine to preserve the States' ability to choose from among a broad range of regulatory alternatives.

In this case, there is no dispute that the four States clearly articulated a policy of supplanting competition with regulation, authorizing collective setting of rates for title search and examination services. The sole question is whether the States "actively supervise" that private conduct—whether state officials "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

That inquiry focuses on the structure of the regulatory system established by the applicable state law. In the four States whose regulatory systems are at issue

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ualty Co., *supra*, that the exemption is unavailable merely because the state has not exercised its regulatory authority.

Brief for the United States as Amicus Curiae at 27 n.38, *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) (No. 81-389).

here, (1) the state regulators possessed the power to overturn private action that violates the State's clearly articulated policy; (2) the regulators also were charged with the duty to ensure that rates comport with that standard; (3) aggrieved parties could seek relief from regulators; and (4) there was some form of judicial review. These elements are sufficient to establish active supervision. They "impl[y] the exercise (as well as the mere existence) of power because [they] impose[] legally enforceable duties on state officials—duties which a federal court may not, under normal principles of federalism, assume they will disregard." *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990).

Indeed, these four elements were present in the regulatory system the Court addressed in *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985). In the subsequent *Patrick* litigation, both the FTC and this Court strongly indicated that the existence of such a regulatory structure is sufficient to establish active supervision. In view of the widespread use of this regulatory structure for rate regulation, the result could hardly be otherwise. Congress and the States obviously employ this approach precisely because they have concluded that it allows them to monitor rates effectively.

The FTC now argues that the active supervision inquiry should not turn on the regulatory structure established by state law, but should instead look to whether the state regulators are doing their job effectively. If the state regulation is deemed sufficiently rigorous, active supervision will be found. If, on the other hand, the regulators' level of activity falls short of what the federal agency or jury deems appropriate, state action immunity will not be available.

The FTC's position would transform the state action doctrine, which is designed to *preserve* state autonomy, into a tool for intrusive federal review of the adequacy

and effectiveness of state regulation. Not only would that standard produce unseemly intrusions upon state sovereignty, but it would also enable the FTC or the federal jury to substitute its own public interest determination for that of the state regulators, precisely the result that this Court has rejected in prior decisions construing the state action doctrine.

In addition, the FTC's approach simply is not manageable. How would the Commission or federal jury go about deciding whether the state regulators' scrutiny of private conduct was sufficiently rigorous? Presumably some sort of evidentiary record—consisting of testimony from regulators and excerpts from regulatory proceedings—would have to be developed in every case. That record would then be presented to the finder of fact, which would then apply the FTC's amorphous federal-law standard of rigorosity to the state regulators' actions.

Finally, the Commission's standard will significantly limit the regulatory alternatives available to the States, the precise result that *Parker* was intended to avoid. A State wishing to authorize collective ratemaking could no longer use the conventional regulatory system employed here: because regulated entities would face the risk that antitrust immunity would later be held unavailable on the ground that the state regulator failed to perform appropriately, those businesses would be deterred from exercising their authority to engage in collective ratemaking. A State that wanted to make collective activity a realistic option would have no choice but to subject all private conduct to full-blown administrative review, thereby ensuring that the federal "active supervision" standard would be satisfied. That would decrease regulatory efficiency and increase cost.

The Commission tries to defend its approach by asserting that its standard is necessary to permit the States to control the scope of antitrust immunity. But the States retain plenary control under the standard adopted by the

court of appeals and described above—they can ensure the application of the antitrust laws simply by stating in the governing statute that a regulatory system is not meant to supplant the free competition mandate of the Sherman Act.

II. The attorneys general of a number of States have filed a brief in this case purporting to address the questions presented by the FTC. But virtually the entire brief relates to a wholly distinct question—whether the clearly articulated policies of Montana and Wisconsin to supplant competition with regulation extended only to the filing of joint rating information or also reached joint ratemaking. The FTC has conceded that the two States clearly articulated a policy to authorize collective ratemaking, and an amicus may not properly interject new issues not presented by the party to the litigation. Accordingly, the question raised by the attorneys general is not before the Court in this case.

Indeed, the issue discussed by the attorneys general concerning the scope of *Parker* immunity in the regulatory context resembles one of the questions that will be presented in a certiorari petition that we plan to file shortly seeking review of *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). We urge the Court to await the case that properly presents the question before addressing that important—but distinct—issue regarding the scope of *Parker* immunity.



## ARGUMENT

### I. RESPONDENTS' CONDUCT IS PROTECTED UNDER THE *PARKER* DOCTRINE

#### A. The State Action Doctrine Of *Parker v. Brown* Rests On Fundamental Principles Of Federalism.

This Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943), rests on the determination that "Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) (footnote omitted). Unrestricted application of the antitrust laws to state regulatory schemes would have prevented the States from engaging in *any* economic regulation. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978) ("if an adverse effect on competition were, in and of itself, enough to render a state statute invalid [under the antitrust laws], the States' power to engage in economic regulation would be effectively destroyed"); Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 24 (1983) ("application of the antitrust laws would crimp the legislative authority of states far more effectively than the old substantive due process cases") (footnote omitted).

In holding that the States may adopt their own regulatory systems inconsistent with the free competition mandate of the Sherman Act, *Parker* relied on "principles of federalism and state sovereignty." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1349 (1991). Indeed, the decision reflects the fundamental principle—which this Court had applied a few years before in curtailing substantive due process review—"that the states should be free to make their own economic decisions, whether or not they comport with the economic principles in vogue with the federal judiciary." \* \* \* At the core of the *Parker* doctrine are higher policies of federalism and judicial economic neutrality which

counsel against intervention in state regulatory decisions." Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 Colum. L. Rev. 328, 334 (1975). See also Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 499 (1987) (describing *Parker* as "a case about judicial respect for the political process").

Preservation of the States' power to make their own regulatory choices has remained the touchstone of the state action doctrine. In *Southern Motor Carriers*, for example, the Court held that the state action doctrine protects private parties as well as public officials, reasoning that "[i]f *Parker* immunity were limited to the actions of public officials, \* \* \* a State would be unable to implement programs that restrain competition among private parties." 471 U.S. at 56. The Court also rejected the contention that *Parker* immunity should be available only when state law compels private parties to engage in particular conduct, holding that state authorization of private conduct is sufficient because a compulsion requirement would "reduce[] the range of regulatory alternatives available to the State." *Id.* at 61.

Just last Term, in *City of Columbia*, 111 S. Ct. at 1350, the Court held "that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect," assertions that state or local officials exceeded their power under state law will not defeat antitrust immunity. Otherwise, the Court observed, the state action doctrine would "'dictate[] transformation of state administrative review into a federal antitrust job.'" *Ibid.* (citation omitted). The Court also refused to recognize a "conspiracy" exception to *Parker* immunity on the ground that such an exception would make governmental decisions "subject to *ex post facto* judicial assessment of 'the public interest,' \* \* \* [which would] go[] far to 'compromise the States' ability to regulate their domestic commerce.'" *Id.* at 1352 (citation omitted).



### B. The Four States Actively Supervised Respondents' Conduct.

1. The Court has developed a two-part test to determine whether particular private conduct was engaged in pursuant to a system of state regulation and is therefore immune from antitrust liability under *Parker*. First, "the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy to replace competition with regulation.'" *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984) (citation omitted). Second, "the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted).

There is no dispute that the first element of the Court's test is satisfied here. The FTC has stipulated that the four States clearly articulated a policy of permitting collective setting of rates for charges for title search and examination services. Pet. App. 37a; FTC Br. 9 n.6. The States have thus affirmatively decided to supplant competition with regulation. See *Southern Motor Carriers*, 471 U.S. at 51, 59-60 (discussing reasons why a State would authorize collective ratemaking). The FTC's repeated reference to "price-fixing" is nothing more than a disagreement with the States' policy choice (see Pet. App. 113a (dissenting opinion)) and cannot disguise the fact that respondents' concerted activity is conduct expressly authorized pursuant to the public policy of these States.

The focus of this case is thus *Midcal*'s "active supervision" requirement. The Court recently stated that "[t]he active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). The requirement is designed to prevent private parties from avoiding antitrust liability by "casting \* \* \* a gauzy

cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106.

This Court's decisions establish that there can be no active supervision if state officials lack the power to forbid conduct that violates the governing state policy. In *Patrick*, for example, the Court held that Oregon did not actively supervise peer review decisions denying hospital privileges to doctors because no state official had "power to review private peer review decisions and overturn a decision that fails to accord with state policy." 486 U.S. at 102. Accord, *Midcal*, 445 U.S. at 105-106 ("[t]he State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts").

The present case differs significantly from *Patrick* and *Midcal*. It is clear that—to use *Patrick*'s terms—the officials in each of the four States "have" the power under state law to overturn the private decisions. Pet. App. 30a (Arizona), 32a (Connecticut), 34a (Montana), 36a (Wisconsin). The only question is whether the state officials "exercise" their power to oversee private decisions. As we now show, this element of the *Midcal* test is plainly satisfied.

2. It is undisputed that each of the four States had in place a regulatory structure for oversight of rate filings that (1) required the filing of rates with the state regulators; (2) directed the state regulators to ensure that rates charged by regulated businesses comported with the statutory standard; (3) permitted aggrieved parties to file challenges to proposed rates; and (4) provided for some form of judicial review. Pet. App. 30a-31a (Arizona), 32a-33a (Connecticut), 34a-35a (Montana), 36a-37a (Wisconsin).<sup>2</sup>

<sup>2</sup> The decisions below do not address the power of affected parties to challenge filed rates, but a review of the governing statutes in-

That is sufficient to establish active supervision. What is crucial for purposes of *Parker* is the structure of the regulatory system established by the applicable state laws. Each of the States here charged its regulators with the duty to ensure that rates accord with the statutory standard and established a mechanism for reviewing and setting aside rates that failed to conform to the applicable state law standard. Such state regulatory schemes “imply the exercise (as well as the mere existence) of power because [they] impose[] legally enforceable duties on state officials—duties which a federal court may not, under normal principles of federalism, assume they will disregard.” *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990).

As both the court below and the First Circuit have concluded,

“[w]here as here the state’s program is in place, is staffed and funded, grants to state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state’s courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state’s policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state’s own action, it would become a means

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indicates that a procedure is available. See J.A. 170-171 (Arizona), 177-178 (Connecticut), 196 (Montana), 201 (Wisconsin).

The FTC makes much (Br. 25-27) of the supposed inadequacy of the mandamus remedy. Whatever the merits of the Commission’s argument in a situation where state oversight of private conduct could occur only in the context of a mandamus action, it is irrelevant here because the court of appeals did not rely solely on the availability of mandamus. The key fact here is that state law directs the regulators to oversee rates. The availability of judicial review simply bolsters that protection.

for federal oversight of state officials and their programs.”

Pet. App. 28a (quoting *New England Motor Rate Bureau*, 908 F.2d at 1071).

Indeed, this Court’s opinion in *Patrick* strongly indicates that the existence of such a regulatory structure is sufficient to establish active supervision. In describing that element of the *Midcal* test, the Court stated:

the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. Cf. *Southern Motor Carriers Rate Conference, Inc. v. United States*, *supra*, at 51 (noting that state public service commissions “have and exercise ultimate authority and control over all intrastate rates”).

*Patrick*, 486 U.S. at 101. The regulatory system described in *Southern Motor Carriers* is essentially identical to those in the present case: common carriers were required to submit proposed rates that became effective if the state agency took no action within a specified period of time. See 471 U.S. at 50-51. By citing that system as an example of active supervision in the course of the discussion in *Patrick*, the Court indicated that such a system of regulatory oversight satisfies the *Midcal* test. Indeed, the *Patrick* standard employs precisely the same language (“have and exercise”) the Court used to describe the rate regulation system in *Southern Motor Carriers*. That is further evidence that the Court intended to point to the rate regulation system described in the latter case as a system of state regulation that satisfies the active supervision requirement.

The government likewise pointed to the system in *Southern Motor Carriers* as a paradigm of active supervision throughout its amicus brief in *Patrick*, which was signed by the FTC as well as the Department of Justice. See Br. for the United States as Amicus Curiae Supporting



Petitioner 8, 12, 13, 16, *Patrick v. Burget*, 486 U.S. 94 (1988) (No. 86-1145). It is telling that the government, which thought the existence of active supervision so clear in *Southern Motor Carriers* that it *conceded* the point, and which affirmatively cited *Southern Motor Carriers* as an example of active supervision throughout the *Patrick* case, now seeks to escape the implications of *Southern Motor Carriers* by observing that "only application of the 'clear articulation' prong of the *Midcal* test was at issue in this Court." Br. 18 n.9. It is too late in the day to suggest that *Southern Motor Carriers* involved anything less than a prototype of active supervision.<sup>3</sup>

It would be most surprising if the result were otherwise. The system described in *Southern Motor Carriers* is the paradigm for rate regulation in this country. Under various federal rate regulation schemes, for example, proposed rates are filed with the regulatory body and permitted to go into effect if no regulatory action occurs within a specified time period. See, e.g., 15 U.S.C. §§ 717c-717d (Natural Gas Act); 16 U.S.C. §§ 824d-824e (Federal Power Act); 47 U.S.C. §§ 201-204 (Communications Act); 49 U.S.C. §§ 10701-10713 (Interstate Commerce Act). And, as *Southern Motor Carriers* and this case

<sup>3</sup> Just as the Commission ignores this Court's (and its own) subsequent treatment of *Southern Motor Carriers* in arguing that the case did *not* involve "active supervision," so too the Commission is engaged in revisionist history in trying (Br. 20) to turn *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), into a case that *did* confront the question of "active supervision." The *Cantor* case was decided before *Midcal* and did not discuss the state action issue in the "clear articulation" and "active supervision" terms that have since become familiar. Nevertheless, analyzed in those terms, its holding is that the State had not *clearly articulated* a policy to supplant competition with regulation. *Id.* at 584-585, 594-595. See also *Southern Motor Carriers*, 471 U.S. at 64 ("in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market"). The decision does not address the active supervision issue and is irrelevant here.

demonstrate, that procedure is frequently employed by the States as well. The fact that this system of regulation is so widely used itself demonstrates that it meets the *Midcal* standard: Congress and the States obviously have employed this approach precisely because they have concluded that it enables regulators to monitor rates and ensure that regulated entities abide by the applicable statutory standard. That is what "active supervision" requires.<sup>4</sup>

3. The FTC nonetheless contends that this conventional model of rate regulation does not produce active supervision of the parties whose rates are being regulated, asserting (Br. 20) that what is required is "an affirmative determination by state officials that the particular anticompetitive activity at issue is consistent with state policy." Notwithstanding that statement, the FTC does *not* argue that the active supervision requirement is satisfied only if the State officially determines that the challenged conduct satisfies the applicable state law standard. The Commission specifically endorses (Br. 21 n.13) the result in *New England Motor Rate Bureau*, in which the First Circuit held the active supervision requirement satisfied by a system essentially identical in structure to the ones presented here: the private party was required to file its rates with the state regulatory agency, and those rates became effective unless the state agency initiated an investigation.

<sup>4</sup> The power to overturn private conduct is insufficient to establish active supervision when state officials have no obligation to measure the private conduct against the state policy, and may act *only* upon the initiative of a private party seeking relief from the private conduct. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.7 (1986) (holding that discretionary authority to override resale prices set by wholesalers upon petition by retailer did not satisfy the *Midcal* active supervision requirement). As we have discussed, the regulators here had the power—and the duty—to act on their own initiative.



What does the FTC cite as the critical distinguishing fact? It relies solely on the fact that a rate analyst employed by the Massachusetts Department of Public Utilities testified that he examined all rate filings, that he would recommend suspension and investigation of a rate filing that seemed "out of line with the average rates" or "extraordinarily high," and that, in his opinion, "whenever tariffs become effective \* \* \* that action results from a determination that the proposed rates meet the [applicable] regulatory criteria." 908 F.2d at 1073 n.12 (emphasis deleted).

The FTC's approach thus turns not on the statutory and regulatory structure established by state law but instead on whether—in the view of the Commission or the federal antitrust court—the record shows that the particular state regulators are properly carrying out their duties. Because the evidence indicated "that unreasonable rates [would] be rejected" by the Massachusetts regulators (908 F.2d at 1077), there was active supervision; because the evidence in this case supposedly shows that regulators in the four States do not fulfill their statutory duties with equal vigor, the FTC says that *Parker* should not apply. As we have already discussed, that position is inconsistent with this Court's discussion of the active supervision requirement in *Patrick* and finds no support whatever in this Court's decisions.

What is more, the FTC's position is fundamentally at odds with the policies underlying the state action doctrine.<sup>5</sup>

<sup>5</sup> The Commission tries (Br. 20 n.12) to support its position by reference to decisions defining the "state action" subject to the Fourteenth Amendment. Among other difficulties, the principal failing of the analogy is that—as the FTC itself states—even approval by the State of private conduct is insufficient to transform it into state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible \* \* \* under the terms of the Fourteenth Amendment") (emphasis added). Because even the Commission's interpretation of *Parker*

To begin with, as we have discussed (at 8-9), the purpose of the state action doctrine is to allocate decision-making responsibility between federal antitrust judges and juries and politically accountable state agencies with regulatory expertise in order to avoid "*ex post facto* judicial assessment of 'the public interest.'" *City of Columbia*, 111 S. Ct. at 1352. In the FTC's view, however, state regulators cannot be trusted to carry out their official responsibilities in accordance with the public interest. As Commissioner Strenio candidly stated, the Commission "insists upon taking a good look at whether State officials have exercised their regulatory authority," refusing to defer at all "to the presumption of the regular performance of official duties." Pet. App. 127a. "The FTC [or the federal court] would, in effect, try the state regulator" by inquiring "whether a particular state's regulatory operation demonstrates satisfactory zeal and aggressiveness." *New England Motor Rate Bureau*, 908 F.2d at 1075.

Certainly the Commission's discussion of the active supervision question in its decision in this case is nothing less than an in-depth critique of the way state regulators carried out their responsibilities. See, e.g., Pet. App. 59a ("the state insurance department suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates"), 68a (holding that States may not base ratemaking on historical rates), 135a (concurring opinion) ("Arizona here could not actively supervise the industry for an extended period because it had no qualified personnel") (footnote omitted).

But such federal second-guessing of the quality of state regulation contravenes *Parker*'s core purpose of promoting federalism. In *City of Columbia*, the Court refused to

fails the Fourteenth Amendment test, the analogy obviously provides no useful guidance in determining the proper contours of the active supervision requirement.

recognize a "conspiracy" exception under which *Parker* would not apply to "any governmental act 'not in the public interest,'" observing that such a test would require federal courts to reexamine the merits of decisions by local governments. 111 S. Ct. at 1352 (citation omitted). The Court stated that "*Parker* was not written in ignorance of the reality that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries." *Ibid.* (emphasis added).

The FTC argues for the very same reallocation of authority here, seeking to open the doors of federal courthouses to those dissatisfied with the state regulators' job performance. Federal review of the quality of state decisionmaking would be an unseemly intrusion upon State sovereignty, the very opposite of the respect demanded by "Our Federalism."<sup>6</sup> "It is not the province of the federal courts nor of federal regulatory agencies to sit in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes." *New England Motor Rate Bureau*, 908 F.2d at 1076 (emphasis in original). See also *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) ("actions otherwise immune [under *Parker*] should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law"). State regulatory decisionmaking is subject to review under state law by both the judicial and political branches of state government. There simply is no warrant for federal intervention into that process.

<sup>6</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federal courts do not assess the quality of state court decisionmaking before deciding to abstain in favor of a state court proceeding. So too here, there is no justification for making the federal courts the forum in which to examine state officials' dedication to their duty.

The federal review proposed by the FTC will inevitably result in the substitution of public interest assessments by the FTC and federal antitrust juries for those of state regulators, the precise result rejected in *City of Columbia*. As the court of appeals observed, "[t]he FTC held that Arizona, Connecticut, Montana and Wisconsin failed *Mideal*'s adequate supervision prong because the regulators in those States were unqualified, they approved rates that the FTC's commissioners would not have approved and they generally did not regulate to the degree that the FTC found desirable." Pet. App. 37a.<sup>7</sup>

Indeed, the intrusion on state regulation that would result from the FTC's approach here is even greater than that threatened in *City of Columbia*. There, the federal court would have reapplied the state law standard, and could have reached a result different from that of the state or local official. Here, a federal court determination that the state regulators did not perform their duties with rigor would lead to total displacement of the state law standard, *even if it were clear that the rates would have been upheld under that standard*. The danger is not that the federal court would apply state law differently than the state regulators, it is that the state regulatory standards would be wholly superseded.<sup>8</sup> Only by focusing the

<sup>7</sup> These different views of the public interest can take the form of disagreements about the amount of justifying information and review—and, therefore, of state resources—necessary to form a judgment about the lawfulness of the rates as well as disagreements about the substantive validity of the rates. Cf. *Heckler v. Chaney*, 470 U.S. 821 (1985) (declining to permit judicial second-guessing of federal agency's decisions not to take enforcement action).

<sup>8</sup> Under the FTC's approach, a party wishing to overturn new rates would be well advised not to raise objections in the state regulatory proceeding (which would be measured against the public interest standard established by state law), but to wait for the rates to take effect and file an antitrust action. If it could create doubts about the effectiveness of the state regulators, the challenger would



active supervision inquiry on the State's regulatory structure—and presuming that state officials do not violate their public trust but rather carry out their state law responsibilities—can the Court accommodate the need to ensure active oversight of private activity with the federalism values underlying *Parker*.<sup>9</sup>

Moreover, the FTC's proposed approach cannot be reduced to a judicially manageable standard. Would evidence of the regulators' general practices suffice? That is what the Commission relies on in defending the result in *New England Motor Rate Bureau*. In its decision in the present case, by contrast, the Commission assessed

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be able to avoid application of the state law standard altogether. Rates set collectively pursuant to state authorization would be invalid even if they would have been upheld under the State's public interest standard.

<sup>9</sup> The filed rate doctrine provides a useful analogy. Under that doctrine, rates permitted to go into effect by a regulatory agency with the power and duty to review them are conclusively presumed to satisfy the applicable statutory standard, without regard to whether the agency actually examined the particular rates. See generally *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). The theory underlying the doctrine is that interested parties should be required to press challenges to the validity of the rate before the body with the power and expertise to make the public interest determination. The same rationale applies here. Cf. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 707 (1991) (because of state agencies' superior ability to judge the public interest, "the best that antitrust courts can do is channel decisions about" deviations from market competition "into a disinterested, politically accountable process"); Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Calif. L. Rev. 227, 249-250 (1987) ("[t]he citizen participation value of economic federalism supports deference to state decisions that are the product of meaningful public participation in the decision to supplant competition with regulation. \* \* \* [T]he important point is that the opportunity to participate exists \* \* \*").

the state regulators' scrutiny of the particular rate filings subject to antitrust attack.

Regardless of which approach the Commission now deems proper, how would the factfinder—which in most cases will be a jury—go about its task? A "mini-trial" on the state regulatory process, complete with testimony or other forms of evidence from state regulators, would be required in every case.<sup>10</sup> Such retrospective examinations would always result in the sort of intrusive second-guessing presented at pages 22-24 and 27-31 of the Commission's brief: was the state review in practice a cursory review of the rate filing or did it involve a substantive assessment of the rates; was the supporting information supplied by the regulated entities sufficient to permit the regulators to undertake a substantive assessment; should the regulators' failure to fully scrutinize some rate filings suffice to establish that such a failure occurred in other cases; and the like.

There simply is no way to tell if the state has "looked" hard enough at the data, and there certainly are no manageable judicial standards by which a court may weigh the various elements of a "public interest" judgment in order to determine whether the legislature or agency decision was correct. Those are political judgments and ought to be made by the legislature and its delegates.

1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213c, at 75 (1978) (footnote omitted).<sup>11</sup>

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<sup>10</sup> The increased burden on the federal courts would be substantial because the fact-bound nature of the inquiry proposed by the FTC would make summary judgment virtually impossible in cases in which a state action defense is presented.

<sup>11</sup> Areeda and Turner take the position that active supervision exists only where the state regulatory structure requires official approval by state regulators. 1 Areeda & Turner, ¶ 213f. They thus disagree with the FTC—because they would base the active supervision determination on the state's regulatory structure, not



In addition to empowering the federal courts to review how well state officials discharge their state law duties, the FTC's approach will significantly limit the regulatory alternatives available to the States—precisely the result that this Court has construed *Parker* to avoid. See *Southern Motor Carriers*, 471 U.S. at 61. A State that wishes to authorize regulated entities to engage in collective rate-making or other joint activities simply could not use the conventional regulatory system employed by the States here. Instead, it would have to adopt, under compulsion of federal law, a system that subjects every private action to full-blown administrative review.

That is so because, under the FTC's interpretation of *Parker*, businesses regulated under a system such as those employed by the four States would be unable to determine in advance whether their conduct would be immunized against antitrust scrutiny. Their immunity would depend on the results of the Commission's—or a federal

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on the intensity of state scrutiny (*New England Motor Rate Bureau* was wrongly decided under their view)—and disagree with the court below as well, because they would not find active supervision where rates may go into effect without official approval.

However, the latter conclusion appears to be based upon generalizations about the state regulatory process that are inapplicable here. Areeda and Turner suggest that "inaction evades statutory approval procedures designed" to allow opponents to challenge rates, assure conscientious decisionmaking, and permit judicial review. ¶ 213f, at 78-79. But, as we have discussed, these elements are all present in the regulatory systems at issue in this case. They also assert that agency inaction shows that the State has not clearly articulated its intent to supplant competition with regulation. ¶ 213f, at 78. It is conceded, however, that the four States here clearly authorized collective ratemaking. Areeda and Turner's conclusion is thus based on assumed gaps in the regulatory structure that simply do not exist here. The applicability of the state action doctrine should not turn on the "trivial" distinction between a state procedure that has the protections discussed above and permits proposed rates to go into effect without official action and one under which proposed rates are given formal approval. *New England Motor Rate Bureau*, 908 F.2d at 1071.

court jury's—*ex post facto* assessment of the adequacy of the state regulatory system. Collective activity would thus carry a risk that *Parker* would be inapplicable if the state regulation was later found to be insufficiently rigorous. Accordingly, businesses would be deterred from joint action for fear that they might be subjected to burdensome antitrust litigation and onerous sanctions, such as treble damages and criminal penalties.<sup>12</sup>

A State that wished to make its authorization of collective activity anything more than an empty hope would be forced to adopt a different regulatory structure—one that required regulators to review proposed rates with vigor and made affirmative approval a precondition to the rates' effectiveness. Such a system would almost certainly reduce regulatory efficiency and increase the State's costs. Constraining the States in that way is inconsistent with the purposes of *Parker*.

Remarkably, the FTC contends (Br. 14, 22) that its approach would *preserve* the States' regulatory options, intimating that a State's regulatory program might otherwise be held to immunize private conduct against antitrust scrutiny even if the State did not intend that result. But *Parker* applies only if a State clearly articulates its intention to supplant competition with regulation. A State that does not want to invoke *Parker* need only make clear in the governing statute that it does not intend to prescribe a different policy. Under the court of appeals' interpretation of *Parker*, therefore, the States retain complete control over the scope of antitrust immunity. It is the FTC that seeks to narrow dramatically the States' ability to choose how to regulate.

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<sup>12</sup> A business that wished to exercise its authority under state law to set rates collectively without the threat of antitrust liability would have to persuade the state regulators to scrutinize its proposed rates, and issue a determination on the merits, *even if the regulators were satisfied that the rates were in the public interest and believed that further scrutiny would be a waste of resources*. That result is truly perverse.

Finally, the Commission is engaged in nothing but hyperbole in asserting (Br. 22) that the approach taken by the court below "effectively abandons the active supervision requirement." It is the FTC that is seeking a sharp break with precedent in urging this Court to declare that one of the prevailing methods of rate regulation in this country does nothing more than "cast[] \* \* \* a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106.

The decision below is entirely consistent with *Patrick* and *Midcal*, and the results in those cases affirm that the active supervision requirement is alive and well. A State still must endow regulators with the power to overturn private decisions and it still must charge regulators with the responsibility for ensuring that private conduct conforms to the public interest. Those are significant requirements that are sufficient to ensure that private conduct is subjected to meaningful review, while at the same time leaving the States with ample flexibility in fashioning their regulatory systems.

## II. THE ARGUMENTS ADVANCED BY THE STATE ATTORNEYS GENERAL DO NOT RELATE TO THE QUESTIONS PRESENTED IN THIS CASE

The amicus brief filed in this case by a number of state attorneys general purports to address the questions presented in the FTC's petition. See Wisconsin, et al. Am. Br. In fact, however, virtually the entire brief relates to a different issue: whether the clearly articulated policies of Montana and Wisconsin to displace competition with regulation were limited to the filing of joint rating information or extended as well to joint ratemaking. That issue is not presented here and may not properly be interjected into the case by amici.<sup>13</sup> That issue does,

<sup>13</sup> *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (Court has "no reason to pass upon" an argument made by an amicus but not by the petitioners); see also *Sony Corp. v. Universal City*

however, resemble one of the questions that will be presented, along with important McCarran-Ferguson Act questions, in a certiorari petition that we plan to file early next year seeking review of *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991). We wholeheartedly agree with the attorneys general that the issue—how to determine the scope of *Parker* immunity in the regulatory context—is an important one that should be addressed by this Court. We urge the Court, however, to await the case that properly presents the issue.

As we have discussed, the FTC conceded that both Montana and Wisconsin clearly articulated a policy to authorize collective ratemaking. See page 10, *supra*; Pet. App. 184a ("[c]omplaint counsel concede that the joint rate making activity by rating bureaus \* \* \* was authorized by state law"). The argument advanced by the attorneys general, however, is that Montana and Wisconsin authorized only "the pooling of experience data and the joint filing of rating information"; the regulatory schemes of those States assertedly "provide for competition to determine the actual level of rates." Am. Br. 13-14. See also *id.* at 18 ("[t]he statutes in Montana and Wisconsin rely upon competition to set title insurance rates").

Proceeding from that premise, the attorneys general argue that "[s]tate acquiescence in one activity (*i.e.*, the filing of pooled rating information) is not state review, much less approval, of a separate and distinct activity of classic horizontal price fixing regarding the underlying expenses in that filing." Am. Br. 21. The fact that *Parker* immunity is available for the first activity, they argue, does not render the second activity immune from antitrust scrutiny. For that reason, the attorneys general contend, collective ratemaking in the two States should not be immune under *Parker*.

*Studios, Inc.*, 464 U.S. 417, 434 n.16 (1984); *Holland v. Illinois*, 493 U.S. 474, 487 n.3 (1990).



Those claims cannot properly be pressed here, however, because of the FTC's concession that "the joint rate making activity" was authorized by state law (emphasis added). Indeed, none of the arguments advanced by the attorneys general in support of their theory of limited state authorization appears in the FTC's discussion of the Montana and Wisconsin regulatory systems. Compare Am. Br. 4-22 with FTC Br. 22-24.<sup>14</sup>

In making this new argument, the state attorneys general expressly rely (Am. Br. 21) on the Ninth Circuit's decision in *In re Insurance Antitrust Litigation*, *supra*. That litigation, which the States instituted for the avowed purpose of "restructur[ing] the [insurance] industry,"<sup>15</sup> has been characterized by one state official as "the biggest and most important civil case now pending in the United States."<sup>16</sup> Despite the attempt of the attorneys general to interpose it here, *Insurance Antitrust Litigation* does not bear on the present issue.

The Ninth Circuit in *In re Insurance Antitrust Litigation* overturned the district court's determination that the defendants were immune under *Parker*. The court of appeals did not reject the state action defense because it faulted the quality of the States' regulatory review (the issue that is presented here). As the attorneys general stated in their response to the rehearing petitions

<sup>14</sup> The only similarity between the two briefs relates to a separate argument—the view that the availability of a mandamus remedy is not sufficient to establish active supervision. Compare FTC Br. 25-27 with Am. Br. 22-27.

<sup>15</sup> Kriz, *Insurers In Their Sights*, National Journal, Oct. 15, 1988, at 2598, quoting former Massachusetts Attorney General James M. Shannon.

<sup>16</sup> *Hearing Before the Subcomm. of the Senate Comm. on Commerce, Science and Transportation on Federal Trade Commission and International Antitrust Laws*, 100th Cong., 2d Sess. 24 (1990) (testimony of Lloyd Constantine, former Chief of Antitrust Enforcement for the State of New York).

filed in the Ninth Circuit in that case (at 9), "[p]laintiffs have never claimed \* \* \* that state officials were negligent in their duties of review and supervision." Indeed, the record in that case is clear that the proposed insurance forms were the subject of continuous discussions with state regulators from 1984 through 1986 and were addressed both at public hearings and forums before insurance regulators in 35 States and at meetings of the National Association of Insurance Commissioners.<sup>17</sup>

Rather, the Ninth Circuit in *Insurance Antitrust Litigation*—observing that "state approval of one activity is not state approval of a related but distinct activity" (938 F.2d at 931)—believed that the States' authorization and approval of the collective development of insurance policy forms did not approve the alleged "boycotts used to produce agreement on the forms." *Ibid.* See also Plaintiffs' Response to Rehearing Petitions in *Insurance Antitrust Litigation* at 9 ("plaintiffs claim that the offending conduct, boycotts, was never submitted to them for review and approval"). The decision thus limits the reach of *Parker* on a ground distinct from that urged by the FTC in the present case.

We agree with the attorneys general that this Court should consider whether the Ninth Circuit's approach correctly defines the scope of state approval for purposes of *Parker* immunity. The Ninth Circuit's decision introduces new uncertainty into the state action question—

<sup>17</sup> See paragraphs 4, 8, 10, and 11 of the affidavit of Carole Banfield, Senior Vice President of Government Relations of the Insurance Services Office, Inc., filed in the district court in *Insurance Antitrust Litigation*. Further, the state agencies made substantive determinations of conformity with state policy. See, e.g., Ex. N in *Insurance Antitrust Litigation* ("[t]he undersigned [Connecticut insurance commissioner] is satisfied that the insurance industry has fairly demonstrated a need for a Claims Made form of insurance \* \* \*. However, the changes which are being required prior to approval of such a policy form within this State are essential if the interests of the public are to be protected").



uncertainty, however, that is entirely unrelated to the question presented in this case and that accordingly will not be resolved by the Court's decision here. Given the tremendous practical importance of the Ninth Circuit's decision, we submit that the Court should address this separate question by granting the certiorari petition seeking review of *In re Insurance Antitrust Litigation*. It should not consider the issue here, where it has not been raised by the FTC and is wholly distinct from the questions on which certiorari was granted.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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